

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 12874

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1955.

RUTH DEPRATTER, VERA MOBLEY, BILLIE TRAINA,
AUDREY MILLER, and JOE DIAZ,

Appellants,

v.

231

GUY FARMER, ABE MURDOCK, IVAR H. PETERSON, PHILIP
RAY RODGERS, and BOYD STEWART LEEDOM, individually
and as chairman and members of the National Labor
Relations Board,

Appellees.

**Appeal from an Order of the United States District Court
for the District of Columbia**

*United States Court of Appeals
For the
District of Columbia Circuit*

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1955

No. 12,874

RUTH DEPRATTER, et al.,
Appellants,

v.

GUY FARMER, et al., individually and as chairman and
members of the National Labor Relations Board,
Appellees.

Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

1 Filed Jun 1 1955 Harry M. Hull, Clerk

* * * *

*Complaint for Injunction
and for Declaratory Judgment*

Come now the plaintiffs and file this their Complaint against the defendants, GUY FARMER, individually and as chairman and member of the National Labor Relations Board, ABE MURDOCK, IVAR H. PETERSON, PHILIP RAY RODGERS, and BOYD STEWART LEEDOM, individually and as members of the National Labor Relations Board, (hereinafter sometimes referred to as the Board), and each of them, and allege as follows:

1. That the plaintiffs, RUTH DePRATTER, VERA MOBLEY, BILLIE TRAINA, AUDREY MILLER, and JOE DIAZ, and each of them, are residents and citizens of the State of Florida and employees of the Shoreline Enterprises of America and Shoreline Packing Corporation, (hereinafter sometimes referred to as the Employer), a corporation existing under and by virtue of the laws of the State of Florida, with its principal place of business in Tampa, Hillsborough County, Florida.

2. That the defendant Guy Farmer is a citizen of the District of Columbia, defendant Abe Murdock is a citizen of the State of Utah, defendant Ivar H. Peterson is a citizen of the State of Virginia, defendant Philip Ray Rodgers is a citizen of the State of Maryland, and defendant Boyd Stewart Leedom is a citizen of the State of South Dakota, and each of them is a resident of and has his principal place of business in the District

2 of Columbia, and is a member of the Board, an agency of the United States Government established under the provisions of the National Labor Relations Act, 29 U.S.C.A., Section 151 et. seq., (hereinafter sometimes called the Act).

3. That this action arises under the Fifth Amendment to the Constitution of the United States and pursuant to Section 10 of the Administrative Procedure Act of 1946 (5 U.S.C.A., Section 1009), as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and cost, the sum of \$3,000.00.

4. That the plaintiffs' Employer is engaged in the business of freezing and packaging shrimp and other sea food products. The International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.I.O., (hereinafter sometimes referred to as the Union), seeks to represent the employees of the Employer and pursuant thereto filed a petition requesting that the Board make an investigation and determine whether or not said employees desired to be represented by said Union for the purpose of collective bargaining in regard to wages, hours and other conditions of employment as provided in Section 9 of the Act.

5. That on March 21, 1955, the Employer, by and through its attorney, entered into a Stipulation for Certification upon Consent Election (a copy of which is attached hereto, marked Exhibit "1" and made a part hereof) with the Union. This stipulation provided that those employees working for the Employer on the week ending March 19, 1955, would be eligible to vote. The election was set for Monday, April 4, 1955, at 3:30 P.M. to 5:00 P.M. and Tuesday, April 5, 1955, at 6:00 A.M. to 6:15 A.M. in the Hillsborough County Port Authority Building located within a short distance of the plant.

The Employer and the Union agreed that the appropriate collective bargaining unit would be composed of "all production and maintenance employees, including refrigeration engineers, excluding truck drivers and
3 excluding all office employees and all clerical employees, professional employees, guards and/or watchmen and supervisors as defined in the Act." This

unit would include all employees who work a substantial portion of their time in production and maintenance jobs, regardless of their other duties.

A representative of the National Labor Relations Board (hereinafter referred to as the Board agent), who was present during the time the Employer and the Union entered into their agreement, insisted that the list of employees working during the week ending March 19, 1955, be agreed to and that those employees who performed work in the excluded category be stricken from the list. The Employer's attorney was not familiar with the duties of the various employees, but the Union agent represented that he was. The Union agent then stated that the plaintiffs Ruth DePratter, Vera Mobley and Billie Traina were clerical employees and that the plaintiff Joe Diaz was a truck driver, and therefore ineligible to vote. The Board agent informed the Employer's attorney that the four plaintiffs last named were ineligible to vote. In view of the statement by Mr. Arthur West, the Board agent, that these plaintiffs were ineligible to vote, the Employer's attorney believing the plaintiffs ineligible, agreed to strike them from the eligibility list, (verification of the aforesaid facts relating to the signing of the election agreement is made in the affidavit of Granville M. Alley, Jr., attached hereto and made a part hereof). No investigation or inquiry was made of the duties of the plaintiffs to determine their eligibility. The plaintiffs were at no time prior to or following the election contacted by the Board or its agents in regard to the duties they performed. No ruling or determination whatsoever has been made as to the eligibility of the plaintiffs to vote in said election.

Pursuant to said agreement the Employer posted the Board's official "Notice of Election" in conspicuous places throughout his plant. This Notice gave the pertinent information concerning the election such as the place, date,

time. In addition the Notice contained the following:

4

"Those eligible to vote are all production and maintenance employees, including refrigeration engineers, who were employed during the payroll period ending March 19, 1955, but excluding truck drivers and excluding all office employees and all clerical employees, professional employees, guards and/or watchmen and supervisors as defined in the Act." (Emphasis ours)

At another place the Notice read:

" * * Any employee who desires to obtain any further information concerning the terms and conditions under which this election is to be held or who desires to raise any questions concerning the holding of an election, the voting unit, or eligibility rules may do so by communicating with the Regional Director or his agent in charge of the election." (Emphasis ours)*

6. That the Employer, having been informed by the Board agent that the plaintiffs, Ruth DePratter, Vera Mobley, Billie Traina and Joe Diaz, were ineligible to vote, informed Billie Traina and Joe Diaz just prior to the said election that they were ineligible because of the duties they performed. That the plaintiff Joe Diaz did see and read the Board's "Notice of Election" posted in the Employer's plant, which stated that truck drivers were excluded from those eligible to vote. That on the first day of the election, April 4, 1955, at about noon, the Employer informed the plaintiff Ruth DePratter that she was likewise ineligible to vote and requested the said Ruth DePratter to serve as an election observer for the Employer. The said Ruth DePratter agreed to so serve.

7. That on April 4, 1955, at about 3:00 o'clock P.M. the plaintiff Ruth DePratter, a second observer for the Employer, an officer of the Employer, and the attorney for the Employer attended a pre-election conference at

the Hillsborough County Port Authority Building with two Union observers, two representatives of the Union, and a second Board agent. The Board agent informed the parties that he was going to conduct the election and that he was in complete charge thereof. He then instructed the observers concerning their conduct and duties at the polls. At this time the Board agent also informed the parties present that the plaintiffs, Ruth DePratter, Vera Mobley, Billie Traina and Joe Diaz, were ineligible to vote and in substance said that "if they

5 come over they will not be permitted to vote, but will be sent back to the factory." The plaintiff

Ruth DePratter was permitted to remain at the polls to serve as an observer for the Employer.

That the representative of the Employer then left the polling place and returned to the factory where plaintiffs are employed and told the plaintiff Billie Traina that the Board agent had said she could not vote.

8. That during the voting period, the plaintiff Audrey Miller did go to the polling place and cast a vote. That said vote was challenged by a Union observer. That said Board agent conducting said election did not make any investigation to determine the plaintiff's duties or any investigation of any sort to determine whether said plaintiff was eligible to vote or not, that said plaintiff's vote has not been counted.

9. That shortly thereafter and while voting was in progress, the plaintiff Vera Mobley came to the polling place to vote prior to reporting for work. Although said Vera Mobley did attempt and endeavor to vote, the Board agent who was in complete charge and control of said election informed her that she could not vote in substance as follows: "Well, you can cast a challenged ballot if you want to, but it will not be counted." Said plaintiff being inexperienced in such matters and believing

that the representative of the Board had full knowledge of her eligibility or lack of eligibility and full authority to control said election, in view of his statements to her that it would be a useless and vain act and because of the embarrassment caused to plaintiff thereby, left the line and made no further attempt to vote. This plaintiff then returned to her work where she met and informed the plaintiff Billie Traina, prior to the closing of the polls on April 4, 1955, in detail of what had occurred when she, Vera Mobley, had endeavored to vote, thus confirming in the mind of Billie Traina that she would not be permitted to vote. That the plaintiff Ruth DePratter was present and heard the said Board agent refuse to permit Vera Mobley to vote, thus confirming in the mind of Ruth

DePratter that she would not be permitted to vote.

6 10. That the plaintiff Ruth DePratter did not make any attempt to vote during said election because she had been informed by the Board agent in charge thereof that she could not vote and because the plaintiff Vera Mobley, another person whom the Board agent had told the plaintiff Ruth DePratter was also ineligible to vote, had tried to vote and had been prevented therefrom by the Board agent. That the plaintiff Ruth DePratter was thereby led to believe that any attempt to vote would be useless and vain and would cause embarrassment to herself. That if the Board agent had permitted Vera Mobley to vote, the plaintiff Ruth DePratter would have attempted to vote. That the said Ruth DePratter was at the polls during the entire time the election was conducted and there was ample opportunity for her to vote and she would have voted except for the action of the Board agent as aforesaid. That the two Union observers were called by the Board agent and told that they could vote and although the plaintiff Ruth DePratter was present at that time, she was not likewise informed.

11. That the plaintiff Billie Traina did not go to the voting place or make any attempt to vote during said

election because of having been informed by the Employer immediately prior to the election that the Board agent would not permit her to vote and because the plaintiff Vera Mobley, another person whom the plaintiff Billie Traina had been informed was likewise ineligible to vote, had tried to vote and had been prevented by the Board agent. That the plaintiff Billie Traina was thereby led to believe that any attempt to vote would be useless and vain and would cause embarrassment to herself. That if the Board agent had permitted Vera Mobley to vote, the plaintiff Billie Traina would have tried to vote. The said Billie Traina was at the plant during the voting period and was ready and willing to vote, and would have voted except for the aforesaid action of the Board agent.

12. That the plaintiff Joe Diaz did not make any attempt to vote during said election because he had
7 seen and read the "Notice of Election" posted in said plant and which stated that truck drivers were excluded from those eligible to vote and because he had been informed that the Board agent had stated he could not vote. That the plaintiff Joe Diaz was led to believe thereby that any attempt to vote would be useless and vain and would cause embarrassment to himself. That the said Joe Diaz was ready and willing to vote and would have voted except for the aforesaid action of the defendants.

13. That at all times pertinent hereto, a substantial amount of the working time of these plaintiffs was spent in the performance of production and maintenance work and therefore these plaintiffs were entitled to vote.

14. That the plaintiffs Ruth DePratter, Billie Traina, Vera Mobley and Joe Diaz would have each availed themselves of their right to vote at said election except for the aforesaid illegal, capricious and arbitrary action of the National Labor Relations Board by and through its

agents. That all of said plaintiffs would have voted "no" in said election had they been permitted to vote. That the plaintiff Audrey Miller did vote "no" in said election, but that her vote has not been counted because it was challenged by the Union.

15. That the Board agent certified the results of said election (a copy of said certification being attached hereto, marked as Exhibit "2" and made a part hereof), as follows:

58 votes cast for the Union
 55 votes cast against the Union
 1 vote challenged by the Union

114 votes cast.

That if the plaintiffs had been permitted to vote in accordance with their rights, and if the vote of Audrey Miller had been counted, a majority of the votes would have been against the Union, and the plaintiffs and their fellow employees would have retained their right
 8 and freedom to enter into a contract of employment without the intervention of the Brewery Workers Union as bargaining agent. The results would have been as follows:

58 votes cast for the Union
 60 votes cast against the Union

118 votes cast.

16. That as a result of the illegal, arbitrary and capricious action of the Board and its agent denying the plaintiffs, and each of them, their rights as provided by law and the Constitution of the United States, a bargaining agent was purportedly selected by a vote of a minority of those voting and those who would have voted except for the aforesaid illegal and arbitrary action by the de-

fendants. By the denial to the plaintiffs of their respective rights as aforesaid, the Brewery Workers Union was designated as the exclusive bargaining agent for plaintiffs and plaintiffs' fellow employees, when in truth and in right it was NOT the desire of the majority of the employees voting and those who would have voted except for the aforesaid illegal and arbitrary action by the defendants, to select said Union as bargaining agent, but rather that it was the desire of the majority of the employees voting and those who would have voted except for the aforesaid illegal and arbitrary action by the defendants, that said Brewery Workers Union be rejected as the bargaining agent.

17. That the plaintiffs did protest their treatment by writing a letter to the Regional Director of the Tenth Region of the National Labor Relations Board in Atlanta, Georgia, (a copy of said letter is attached hereto, marked Exhibit "3" and made a part hereof), in which letter the plaintiffs protested that they had been unlawfully denied their right to vote as aforesaid. The Regional Director answered this letter (a copy of which is attached hereto, marked Exhibit "4" and made a part hereof), in which he stated that the plaintiffs, Ruth DePratter, 9 Billie Traina, and Joe Diaz, had not been denied the right to vote because they had not presented themselves at the polls and that the plaintiff Vera Mobley had not been denied her rights because she chose to leave without casting a challenged ballot. The Regional Director concluded that under the circumstances, the matter would be considered closed. The Regional Director did not deny or question the right of the plaintiffs to vote in said election.

That the Employer did file Objections to the Election based on the conduct of the Union and its agents prior and during the election and upon the denial of plaintiffs' right to vote. That an investigation has been made

by the National Labor Relations Board. That at no time during said investigation was any inquiry made as to the duties of the plaintiffs in order to determine their eligibility to vote in said election and the opportunity to vote was thus arbitrarily and illegally taken away from them without a hearing.

That the plaintiffs did again write and protest their treatment to the said Regional Director, (a copy of said letter being attached hereto, marked Exhibit "5" and made a part hereof). That the said Regional Director did reply thereto and make reference to the aforesaid alleged investigation, (a copy of said Regional Director's letter being attached hereto, marked Exhibit "6" and made a part hereof).

That the plaintiffs, and each of them, are not considered by the National Labor Relations Board as parties to the proceedings for selection or rejection of a bargaining agent and therefore are not given any standing to object to the conduct of the election, the Board, the Employer or the Union.

That the plaintiffs have exhausted their administrative remedies and unless protected by this Court their rights will be denied them without due process of law.

18. That the defendants thereby deprived the plaintiffs of their right to participate in an election held
10 for the purpose of selecting or rejecting a bargaining agent, without any judicial, legislative or administrative determination and therefore without due process of law and in violation of the Labor Management Relations Act, 1947 as amended. This election was therefore not in accordance with the principles of due process as guaranteed by the Fifth Amendment of the United States Constitution, or in accordance with the requirements and intent of the Labor Management Relations Act, 1947 as amended. This action by the defendants re-

sulted in the selection and designation of an exclusive bargaining agent that would not have otherwise been selected or designated, and by a minority of the employees voting and who would have voted except for aforesaid illegal and arbitrary action by the defendants, rather than by a majority as required by law. The plaintiffs were thereby deprived of their liberty and property rights in their freedom to bargain with respect to rates of pay, wages, hours of employment and other conditions of employment and to enter into a contract of employment without the intervention of the Brewery Workers Union as bargaining agent, and will be required to work under a contract which is contrary to their desires, all without due process of law as guaranteed by the Fifth Amendment of the United States Constitution, and in contravention to the requirements and intent of the Labor Management Relations Act, 1947 as amended. That the majority of the employees of the Employer are also deprived of their rights to bargain with the Employer and to set the terms and conditions under which they will work, and will thereby be forced to work under contract provisions and conditions not of their making, but set by a bargaining agent who is contrary to their desires, who would not have been elected had the plaintiffs been permitted to vote.

19. That the plaintiffs are informed and believe, and believing, allege the fact to be that notwithstanding the wrongful action of the defendants through its representatives as aforesaid, the defendants as members of the Board, or a majority of them, will certify that the Union was designated by a majority of the employees in the bargaining unit, even though said Union was not selected by a majority but by a minority of the employees who voted and would have voted except for the aforesaid action of the defendants, and will certify said Union as the exclusive bargaining agent for the

plaintiffs and their fellow employees in respect to rates of pay, wages, hours of employment and other conditions of employment. That unless the defendants are enjoined and restrained from giving effect to the said certified results of said election, the defendants will, as members of said Board, certify the Union as the exclusive bargaining agent of plaintiffs and their fellow employees and thereby deprive the plaintiffs of their liberty and property rights in their freedom to bargain in respect to rates of pay, wages, hours of employment and other conditions of employment and to enter into a contract of employment without the intervention of the Brewery Workers Union as the exclusive bargaining agent, and will cause the plaintiffs to be forced to work under a contract contrary to their desires and to suffer this and other irreparable damage, and plaintiffs are without remedy, administrative or otherwise, and are without redress for the protection of their rights as aforesaid, save in this, a Court of Equity.

That the plaintiffs are informed and believe, and believing allege the fact to be that the defendants have the petition of the Union before them and will, as members of said Board, certify the Brewery Workers Union as the exclusive bargaining agent for plaintiffs and plaintiffs' fellow employees immediately unless this Honorable Court enjoins and restrains them from so acting, pending a hearing for a Preliminary Injunction, and will act likewise unless this Honorable Court enjoins and restrains them from so acting, pending final disposition of

12 this suit. That the said Brewery Workers Union, upon certification as aforesaid, will bargain and contract with plaintiffs' Employer and plaintiffs' Employer will be obligated to bargain and contract and will bargain and contract only with the aforesaid Union and will not bargain or contract with plaintiffs. That the plaintiffs will be obligated to bring an action against

their Employer, and another action against the Union, to enjoin them from bargaining and contracting in order to preserve plaintiffs' rights as well as to maintain this action against the defendants. That said suits will involve the same questions of law and fact to be determined in this suit.

WHEREFORE, the plaintiffs pray that the Court will find, order and decree:

1. That a Temporary Restraining Order Without Notice should issue, restraining and enjoining the defendants from giving effect to the apparent results of said election and certifying the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.I.O., as the exclusive bargaining agent for plaintiffs and their fellow employees in the said bargaining unit, pending a hearing on the Preliminary Injunction.

2. That after due notice a Preliminary Injunction be issued, pending a final disposition of this action, enjoining, restraining and ordering the said defendants to refrain from:

- (a) giving effect to the results of said election, and
- (b) certifying the Union as the exclusive bargaining agent for plaintiffs and their fellow employees in the said bargaining unit.

That upon final hearing said Injunction be made permanent.

3. That the action of the defendants as aforesaid was arbitrary and illegal and deprived the plaintiffs of their liberty and property rights in their freedom to bargain in respect to rates of pay, wages, hours of employment and other conditions of employment and to enter into a contract of employment without the intervention of the Brewery Workers Union as the

exclusive bargaining agent, all without due process of law as guaranteed by the Fifth Amendment to the United States Constitution and in contravention to the Labor Management Relations Act, 1947 as amended.

4. That said defendants be ordered to strike from the records of the National Labor Relations Board the certified results of said election.

5. That by Declaratory Judgment determine that said election was void and without effect, and

6. Such other and further relief as the plaintiffs, and each of them, may be entitled.

FOWLER, WHITE, GILLEN,
YANCEY & HUMKEY
1002 Citizens Building
Tampa, Florida

By: /s/ Cody Fowler
A Member of the Firm
Attorneys for Plaintiffs

David C. Bastian
312 Colorado Building
Washington 5, D. C.

14 Filed Jun 1 1955 Harry M. Hull, Clerk

2390-'55

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH)

Before me, the undersigned authority, personally appeared RUTH DePRATTER, who, being by me first duly sworn, deposes and says that she is one of the plaintiffs in the above entitled action, that she has read the foregoing Complaint and knows the contents thereof; and that all facts set forth therein are true of her own knowledge, except only as to matters that specifically relate to an-

other plaintiff individually, and except as to the happenings and statements made in the meeting between the representatives of the Employer, the Union and the Board at which the election agreement was signed, and that as to the allegations in reference to other plaintiffs and the occurrences at the meeting between the Employer, Union and Board representative, she is informed and believes these matters to be true; and except as to matters which are alleged in said Complaint on information and belief, and as to these matters she believes the same to be true; and therefore, all matters alleged in said Complaint are true either from plaintiff's own knowledge or upon information and belief.

/s/ Ruth DePratter
Ruth DePratter

Sworn to and subscribed
before me this 27th day
of May, 1955

/s/ Mary L. Newman
Notary Public
State of Florida at Large
My Commission expires: Oct. 25, 1957

15 Filed Jun 1 1955 Harry M. Hull, Clerk

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH)

Before me, the undersigned authority, personally appeared JOE DIAZ, who, being by me first duly sworn, deposes and says that he is one of the plaintiffs in the above entitled action, that he has read the foregoing Complaint and knows the contents thereof; and that all facts set forth therein are true of his own knowledge, except only as to matters that specifically relate to another plaintiff individually, and except as to the happenings and statements made in the meeting between the representa-

tives of the Employer, the Union and the Board at which the election agreement was signed, and that as to the allegations in reference to other plaintiffs and the occurrences at the meeting between the Employer, Union and Board representative, he is informed and believes these matters to be true; and except as to matters which are alleged in said Complaint on information and belief, and as to these matters he believes the same to be true; and therefore, all matters alleged in said Complaint are true either from plaintiff's own knowledge or upon information and belief.

/s/ Joe Diaz
Joe Diaz

Sworn to and subscribed
before me this 27th day
of May, 1955.

/s/ Mary L. Newman
Notary Public
State of Florida at Large
My Commission expires: Oct. 25, 1957

16 Filed Jun 1 1955 Harry M. Hull, Clerk

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH)

Before me, the undersigned authority, personally appeared BILLIE TRAINA, who, being by me first duly sworn, deposes and says that she is one of the plaintiffs in the above entitled action, that she has read the foregoing Complaint and knows the contents thereof; and that all facts set forth therein are true of her own knowledge, except only as to matters that specifically relate to another plaintiff individually, and except as to the happenings and statements made in the meeting between the representatives of the Employer, the Union and the Board at which the election agreement was signed, and

that as to the allegations in reference to other plaintiffs and the occurrences at the meeting between the Employer, Union and Board representative, she is informed and believes these matters to be true; and except as to matters which are alleged in said Complaint on information and belief, and as to these matters she believes the same to be true; and therefore, all matters alleged in said Complaint are true either from plaintiff's own knowledge or upon information and belief.

/s/ Billie Traina
Billie Traina

Sworn to and subscribed
before me this 27th day
of May, 1955.

/s/ Mary L. Newman
Notary Public
State of Florida at Large
My Commission expires: Oct. 25, 1957

17 Filed Jun 1 1955 Harry M. Hull, Clerk

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH)

Before me, the undersigned authority, personally appeared VERA MOBLEY, who, being by me first duly sworn, deposes and says that she is one of the plaintiffs in the above entitled action, that she has read the foregoing Complaint and knows the contents thereof; and that all facts set forth therein are true of her own knowledge, except only as to matters that specifically relate to another plaintiff individually, and except as to the happenings and statements made in the meeting between the representatives of the Employer, the Union and the Board at which the election agreement was signed, and that as to the allegations in reference to other plaintiffs and the occurrences at the meeting between the Employer,

Union and Board representative, she is informed and believes these matters to be true; and except as to matters which are alleged in said Complaint on information and belief, and as to these matters she believes the same to be true; and therefore, all matters alleged in said Complaint are true either from plaintiff's own knowledge or upon information and belief.

/s/ Vera Mobley
Vera Mobley

Sworn to and subscribed
before me this 27th day
of May, 1955.

/s/ Mary L. Newman
Notary Public
State of Florida at Large
My Commission expires: Oct. 25, 1957

18 Filed Jun 1 1955 Harry M. Hull, Clerk

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH)

Before me, the undersigned authority, personally appeared AUDREY MILLER, who, being by me first duly sworn, deposes and says that she is one of the plaintiffs in the above entitled action, that she has read the foregoing Complaint and knows the contents thereof; and that all facts set forth therein are true of her own knowledge, except only as to matters that specifically relate to another plaintiff individually, and except as to the happenings and statements made in the meeting between the representatives of the Employer, and the Union and the Board at which the election agreement was signed, and that as to the allegations in reference to other plaintiffs and the occurrences at the meeting between the Employer, Union and Board representative, she is informed and believes these matters to be true; and except as to matters

which are alleged in said Complaint on information and belief, and as to these matters she believes the same to be true; and therefore, all matters alleged in said Complaint are true either from plaintiffs' own knowledge or upon information and belief.

/s/ Audrey Miller
Audrey Miller

Sworn to and subscribed
before me this 27th day
of May, 1955.

/s/ Mary L. Newman
Notary Public
State of Florida at Large
My Commission expires: Oct. 25, 1957

19 Filed Jun 1 1955 Harry M. Hull, Clerk

Affidavit

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH) ss:

Before me, the undersigned authority, personally appeared GRANVILLE M. ALLEY, JR., who, being by me first duly sworn, deposes and says:

I reside at 3932 Bay Court, Tampa, Florida. I represented Shoreline Enterprises of America and Shoreline Packing Corporation in a conference with Edward S. Gerchak, International Representative of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.I.O., and Arthur West, a Field Examiner for the National Labor Relations Board. This conference was held for the purpose of entering into an agreement providing for an election to be held at Shoreline Packing Corporation to determine whether the employees wished to be represented for the purposes of collective bargaining by the aforesaid Union.

The Union desired to eliminate from the unit the plant clericals and the truck drivers. The Employer wanted the unit to include the aforesaid jobs. After considerable discussion, the Employer conceded. The unit was thereafter defined as "all production and maintenance employees, including refrigeration engineers, excluding truck drivers and excluding all office employees and all clerical employees, professional employees, guards and/or watchmen and supervisors as defined in the Act."

It was contended by the Union representative that Billie Traina, Vera Mobley and Ruth DePratter were plant clericals and that Joe Diaz was a truck driver. The Union therefore contended that these names should be stricken from the eligibility list because they worked without the unit. I was aware that the parties performed the various jobs as stated by the Union representative, but I
 20 was not aware that they also performed work within the unit, or the extent of that work. I did not want to strike the employees from the eligibility list, but the Field Examiner insisted. He assured me that the employees were ineligible to vote and on that basis I placed my initials following the line drawn through the employees' names.

To my knowledge, no investigation has ever been made by the National Labor Relations Board concerning the various jobs performed by the aforesaid employees.

/s/ Granville M. Alley, Jr.
 Granville M. Alley, Jr.

Sworn to and subscribed
 before me this 30th day
 of May, 1955.

/s/ Mary L. Newman
 Notary Public
 State of Florida at Large
 My Commission expires: Oct. 25, 1957

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

*Exhibit "1"**Stipulation for Certification Upon Consent Election*

(RC and RM cases)

The undersigned labor organization(s) (herein called the union(s)) claim(s) to represent employees of the undersigned employer (herein called the employer), and the undersigned parties desire that the question concerning the representation of said employees which exists by virtue of said claim shall be resolved by an election by secret ballot. Therefore, the said parties, subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director), HEREBY AGREE AND STIPULATE AS FOLLOWS:

1. SECRET BALLOT—An election by secret ballot shall be conducted under the supervision of the Regional Director, among the employees in the Unit defined below, at the indicated time and place, to determine whether or not the employees desire to be represented by (one of) the Union(s). Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board.

2. ELIGIBLE VOTERS—The eligible voters shall be those employees included within the Unit described below, who were employed during the payroll period indicated below, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the military services of the United States who appear in person at the polls, but *excluding* any employees who have since quit or been discharged for cause and

have not been rehired or reinstated prior to the date of the election and any employees on strike who are not entitled to reinstatement. At a date fixed by the Regional Director, the Employer will furnish to the Regional Director an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

3. NOTICES OF ELECTION—The Regional Director shall prepare a Notice of Election and supply copies to the parties describing the manner and conduct of the election to be held and incorporating therein a sample ballot. The Employer, upon the request of and at a time designated by the Regional Director, will post such Notice of Election at conspicuous and usual posting places easily accessible to the eligible voters.

4. OBSERVERS—Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer, at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally. As soon after the election as feasible, the votes shall be counted and tabulated by the Regional Director, or his agent or agents. Upon the conclusion of the counting, the Regional Director shall furnish a Tally of Ballots to each of the parties.

5. POST-ELECTION AND RUN-OFF PROCEDURE—All procedure subsequent to the conclusion of counting ballots shall be in conformity with the Board's Rules and Regulations.

6. RECORD—The record in this case shall be governed by the appropriate provisions of the Board's Rules and Regulations and shall include this stipulation. Hearing and notice thereof, Direction of Election, and the making of Findings of Fact and Conclusions of Law by the Board prior to the election are hereby expressly waived.

21 7. COMMERCE—The Employer is engaged in commerce within the meaning of Section 2 (6) of the National Labor Relations Act, and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c).

The employer is a Florida corporation engaged in the processing and packaging of shrimp and other seafoods. During the year ending January 31, 1955 it shipped directly outside of the State of Florida products valued at \$64,000 to customers in states other than the State of Florida of which products valued at \$24,000 were shipped under their own brand and as commodity shrimp and products valued at \$40,000 were shipped to Campbell Soup Company, Camden, N. J., for use in their products. (Insert commerce facts)

8. NAMES ON BALLOT—In the event more than one labor organization is signatory to this agreement, the choices on the ballot will appear in the wording indicated below and in the order enumerated below, reading from left to right on the ballot:

First Yes
Second No
Third
Fourth

9. PAYROLL PERIOD FOR ELIGIBILITY—Week ending March 19th, 1955

10. DATE, HOURS, AND PLACE OF ELECTION—Monday, April 4, 1955, 3:30 P.M. to 5:00 P.M. and Tuesday, April 5, 1955, 6:00 A.M. to 6:15 A.M., Tampa Port Authority Building.

11. THE APPROPRIATE COLLECTIVE BARGAINING UNIT—All production and maintenance employees including refrigeration engineers; excluding truck drivers and excluding all office employees and all clerical em-

ployees, professional employees, guards and/or watchmen and supervisors as defined in the Act.

If Notice of Representation Hearing has been issued in this case, the approval of this stipulation by the Regional Director shall constitute withdrawal of the Notice of Representation Hearing, heretofore issued.

EMPLOYER Shoreline Enterprises of America and Shoreline Packing Corporation

ADDRESS Tampa, Florida

BY (Name and Title) Granville M. Alley, Jr., Attorney

DATE EXECUTED March 21, 1955

NAME OF ORGANIZATION The International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.I.O.

ADDRESS Tampa, Florida

BY (Name and Title) /s/ Edward S. Gerchak Edward S. Gerchak

NAME OF ORGANIZATION International Representative

Case No. 10-RE-2995

Exhibit "2"

23 UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of
SHORELINE ENTERPRISES OF AMERICA, INC.
AND SHORELINE PACKING CORPORATION
Employer

and

THE INTERNATIONAL UNION OF UNITED BREW-
ERY, FLOUR, CEREAL, SOFT DRINK AND DIS-
TILLERY WORKERS OF AMERICA, C.I.O.,
Petitioner

Case No. 10-RC-2995

Date issued April 5, 1955

Type of election (Check one):

() Consent (XX) Stipulated () Board ordered

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

- | | |
|--|-------|
| 1. Approximate number of eligible voters.. | 145 * |
| 2. Void ballots | None |
| 3. Votes cast for Petitioner | 58 |
| 4. Votes cast for..... | |
| 5. Votes cast for..... | |
| 6. Votes cast against participating labor organization(s) | 55 |
| <hr/> | |
| 7. Valid votes counted (sum of 3, 4, 5, and 6)..... | 113 |
| 8. Challenged ballots | 1 |
| <hr/> | |
| 9. Valid votes counted plus challenged ballots (sum of 7 and 8) | 114 |
| 10. Challenges are (not) sufficient in number to affect the results of the election. | |
| 11. A majority of the valid votes counted plus challenged ballots has been cast for: | |
| Petitioner | |

* Includes one challenged vote

For the Regional Director

/s/ Alexander W. Ream

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly

and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For EMPLOYER

/s/ Billy D. Hice

For PETITIONER

/s/ Edward S. Gerchak

24 Filed Jun 1 1955 Harry M. Hull, Clerk

Exhibit "3"

COPY

Tampa, Florida
6, April

Regional Director
National Labor Relations Board
Atlanta, Georgia

Dear Sir:

We are writing in reference to the C. I. O. Union election, recently held at Shoreline Enterprises of America.

As you know by your records, the Union was voted in by a fifty-eight to fifty-five majority. Several of the employees feel their votes were unjustly ruled out.

We four employees were considered clerical workers, but while we do have duties which come under that classification, we also have duties which are directly involved with the processing system.

For many months after we were hired, our duties consisted entirely of production work. After almost a year of this, we were placed in our present positions, which as we have stated, do not entirely deal with clerical work.

Therefore we believe we should have the privilege of voting, as well as the other employees of the plant.

It is our belief that our votes were disqualified because of our views. We made no secret of our disposition. The Union representatives in the plant knew of our opinions, and we feel, made use of this knowledge, by stating to the N. L. R. B. that we did only clerical work, in order to keep us from the polls.

Since we are working directly in the plant, we would like you to consider our votes. We feel this election should be set aside, in order for our case to be considered.

Sincerely,

/s/ Vera Mobley
/s/ Billie Traina
/s/ Ruth DePratter
/s/ Joe Diaz

CC: Billy Hice
Shoreline E. of A.
Ed. Gerchak
C. I. O. Union

25 Filed Jun 1 1955 Harry M. Hull, Clerk

Exhibit "4"

COPY
NATIONAL LABOR RELATIONS BOARD
TENTH REGION
Room 537, Peachtree-Seventh Building
50 Seventh Street, Northeast
Atlanta 5, Georgia

April 7, 1955

Miss Ruth DePratter
c/o Shoreline Enterprises of America
Hookers Point
Tampa, Florida

Re: Shoreline Packing Company
Case No. 10-RC-2995

Dear Miss DePratter:

This is in reply to your undated letter, received here today, signed by you and three other employees, concerning your alleged right to vote in the election recently conducted in this case.

The course to be followed by anyone who believes he has a right to vote in an election is to appear at the polls while they are open. If there is question as to the eligibility of such persons, he is allowed to vote a challenged ballot.

Only one of the four signatories to the letter (Vera E. Mobley) appeared at the polls while they were open. The Field Examiner conducting the election explained that the name had been stricken from the list by agreement of the employer and the union, but further explained that a challenged ballot could be cast. Miss Mobley chose to leave without exercising that right.

It is a well established principle that the Board cannot concern itself with matters of eligibility once the election has been completed, unless someone was actually prevented from casting a ballot. Here, no one was prevented from doing so but those signing the letter apparently refrained of their own volition.

Under the circumstances we have no alternative except to consider the matter closed.

Very truly yours,

/s/ John C. Getreu
Regional Director

CC: Mr. Billy D. Hice
Shoreline Enterprises of America
Hookers Point
Tampa, Florida
Mr. Edward Gerchak, Int'l Rep.
Brewery Workers, CIO
1226 E. Broadway
Tampa, Florida

27 Filed Jun 1 1955 Harry M. Hull, Clerk

Exhibit "5"

April 20, 1955
Tampa, Florida

COPY

Dear Sir:

This is in reply to your letter of April 7, 1955, informing us that the question of our rights to vote in the recent C.I.O. Union election held at Shoreline Enterprises was to be considered closed.

Although you seemed to think we had no legitimate grounds on which to base our complaint, we still do not agree with you.

You also pointed out the fact that we should have gone to the polls and attempted to cast a ballot if we felt we were eligible to do so. What you do not take into consideration, is the fact that we were told not to appear at the polls. Vera Mobley did so only because she is employed on the night shift and had not been at the plant on the first day of the election, before going to the polls. The other three persons in question, including myself, were told not to appear at the polls. This was doubly stressed by the Board Agent during the instructions to the observers, in the presence of both Union and Company officials. The agent plainly stated that the four persons in question were not to appear at the polls during the election, and if so, they would be sent away and not allowed to vote. He stated I would be allowed to remain only because I was an observer, but again stated, I could not vote.

In your letter you said Vera Mobley left the polls and declined to vote of her own volition. This only happened because the Board Agent informed her, if she cast a challenged ballot, it would not be opened, but thrown away and she would be wasting his and her time.

I have always been under the impression that the N.L.R.B. was a neutral link between Union and Company.

This recent election seems to prove otherwise. We still feel our rights were abused. We do not believe that it was fair to us for the Company and the Union to be able to agree that we couldn't vote and thereby prevent us from voting. We do the same work as those that were permitted to vote. If we had the right to vote we should not have been told that we couldn't vote.

We hope, after reading this, you will reconsider our complaints and case.

Yours truly,

28 Filed Jun 1 1955 Harry M. Hull, Clerk

An Affidavit

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH SS

Before me, the undersigned authority, personally appeared Ruth DePratter, who, being my first duly sworn do depose and say:

I am an employee of Shoreline Packing Corporation.

I was told by Mr. Hice, vice president of Shoreline Packing Corporation, at noon on the day of the election that I wouldn't be eligible to vote. He asked me to serve as an observer for the election and I agreed to do so.

Shortly before the election the Board Agent gave the observers their instructions. At that time the Board Agent stated that if any of the four of us (Traina, Diaz, Mobley or myself) showed up they would be sent back to the plant and not permitted to vote. I was told that I could stay because I was an observer but that I could not vote.

I was at the polls when Vera Mobley tried to vote. The Board Agent told Vera that she could cast a challenged vote, but that it wouldn't be counted. He did not tell her that it might be counted under certain circumstances.

I was present during the entire election period and I was never told that I could vote. The two observers for the Union were told to vote by the Board Agent. I was at the polls and I would have voted except for the fact that I had been specifically told I couldn't and because I saw that Vera Mobley was not permitted to vote.

Further affiant saith not.

/s/ Ruth DePratter
Ruth DePratter

Sworn to and subscribed before me,
this 20 day of April 1955.

/s/ Mary Frances McDuffie
Notary Public, State of Florida at Large
My Commission expires: 10-20-57.

29 *An Affidavit*

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH SS

Before me the undersigned authority, personally appeared Joe Diaz, who, being by me first duly sworn do depose and say:

I am an employee of Shoreline Packing Company.

I did not vote in the Labor Board election early this month. A week before the election Mr. Hice came to me and showed me the notice of election and told me that I could not vote. Because I had been told I could not vote, I did not appear at the polls and try to vote.

/s/ Joe Diaz
Joe Diaz

sworn to and subscribed before me,
this 20 day of April 1955.

/s/ Mary Frances McDuffie
Notary Public, State of Florida at Large
My commission expires: 10-20-57

30

An Affidavit

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH SS

Before me the undersigned authority, personally appeared Billie Traina, who being by me first duly sworn do depose and say:

I am an employee of Shoreline Packing Company.

I did not vote in the recent labor election at Shoreline Packing Company because I was told I could not vote. I was first told that I could not vote during the week preceding the election by Mr. Hice. On the day of the election Mr. Hice told me that he had been definitely informed that I could not vote.

I did not try to vote because of what Mr. Hice had told me and because I was told that Vera Mobley had tried to vote and had been sent back to the plant and not permitted to vote and that the same thing would happen to me.

Further affiant saith not.

/s/ Billie Traina
Billie Traina

Sworn to and subscribed before me,
this 20 day of April 1955.

/s/ Mary Frances McDuffie
Notary Public, State of Florida at Large
My commission expires: 10-20-57.

31

An Affidavit

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH SS

Before me the undersigned authority this day personally appeared, Vera Mobley, who, being first duly sworn, deposes and says:

I am an employee of Shoreline Packing Corporation.

On April 4, 1955 I went to the polls and tried to vote. The Board Agent told me that I was not eligible to vote because I did clerical work. He said I could cast a ballot, that it didn't make a darn bit of difference with him, but that it wouldn't be counted. Since my vote wasn't going to be counted I did not see any use casting a vote and left without voting. He did not tell me that my vote might be counted under certain circumstances.

Further affiant saith not.

/s/ Vera Mobley
Vera Mobley

Sworn to and subscribed before me
this 20 day of April 1955.

/s/ Mary Frances McDuffie
Notary Public, State of Florida at Large
My Commission expires: 10-20-57

32 Filed Jun 1 1955 Harry M. Hull, Clerk

Exhibit "6"

COPY

NATIONAL LABOR RELATIONS BOARD
TENTH REGION
Room 537, Peachtree-Seventh Building
50 Seventh Street, Northeast
Atlanta 5, Georgia

April 21, 1955

Miss Ruth DePratter
P. O. Box 5617
Tampa, Florida

Re: Shoreline Packing Company
Case No. 10-RC-2995

Dear Madam:

This will acknowledge letter dated April 20, 1955, together with attachments. Such letter was signed by you

and also Billie Traina and Joe Diaz. You are advised this situation is currently being investigated by our Field Examiner Woodrow G. Strickland who will interview each of you if he has not already done so.

Please be assured your rights and interests in this matter will receive full consideration by this office.

Very truly yours,

/s/ John C. Getreu
Regional Director

CC: Edward S. Gerchak, Int'l Representative
Brewery Workers, CIO
P. O. Box 827
Tampa, Florida

B. D. Hice
Shoreline Packing Company
Hookers Point
Tampa, Florida

43 Filed Jun 8 1955 Harry M. Hull, Clerk

* * * *

Motion of Defendants to Dismiss the Complaint, or in the Alternative for Summary Judgment in Their Favor

Come now the defendants, by their attorneys, and, in opposition to plaintiffs' motion for a preliminary injunction, move:

1. That the complaint herein be dismissed because:

(a) This Court is without jurisdiction of the subject matter of the action.

(b) The complaint fails to state a claim upon which relief can be granted.

2. In the alternative, that summary judgment for defendants be granted, on the basis of the complaint and

the affidavit of Frank M. Kleiler, Executive Secretary of the National Labor Relations Board, and Exhibit A annexed thereto, which documents are attached to and made a part of this motion.

WHEREFORE, it is respectfully requested that
44 plaintiffs' motion for a preliminary injunction be denied, and that the relief requested by the defendants be granted.

/s/ Marcel Mallet-Prevost
Assistant General Counsel
Norton J. Come

/s/ Robert G. Johnson
Robert G. Johnson
National Labor Relations
Board

Attorneys for Defendants
4th & C Sts., S.W.
Washington, D. C.

Dated June 8, 1955.

45 Filed Jun 8 1955 Harry M. Hull, Clerk

* * * *

*Affidavit of Frank M. Kleiler in Support of Defendants'
Motion to Dismiss, or for Summary Judgment*

District of Columbia, SS:

Frank M. Kleiler, being first duly sworn, deposes and says:

1. He is executive secretary of the National Labor Relations Board and is authorized by Section 102.87 of the Rules and Regulations of the Board, Series 6 (29 C.F.R. 102.87) to certify copies of all papers and documents which are a part of any of the files or records of the Board.

2. He has examined the files and records of the Board in the proceedings entitled "In the Matter of Shoreline Enterprises of America, *et al.*, and International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO," Case No. 10-RC-2995, and has personal knowledge of the facts herein set forth.

3. In the subject representation case, the union filed a petition for a representation election on February 14, 1955. A hearing on the petition was held before a Hearing Officer of the Board on March 3, 1955. Thereafter, the union and the employer entered into a Stipulation for Certification Upon Consent Election, and, on the basis thereof, an election was held on April 4 and 5, 1955.

46 The tally of ballots showed 58 votes for the union, 55 against, and 1 vote challenged.

4. On April 11, 1955, the employer filed objections to the election, alleging, inter alia, that employees Ruth DePratter, Vera Mobley, Billie Traina and Joe Diaz were improperly denied the right to vote therein.

5. On May 16, 1955 the Regional Director of the Board, after investigation of the employer's objections, issued a Report on Election, Objections to Election and Recommendations to the Board, concluding that the employer's objections be overruled in their entirety. A true copy of this report is annexed hereto as Exhibit A.

6. On May 26, 1955, employees Ruth DePratter, Vera Mobley, Billie Traina and Joe Diaz filed with the Board a motion to intervene in the representation proceeding, and also exceptions to that portion of the Regional Director's report concerning their right to vote in the election.

7. On June 7, 1955, the employer filed exceptions to the Regional Director's report in its entirety, and also applied for leave to take depositions concerning its contention that the union observers at the Board election were paid organizers of the union.

8. The Board has not yet acted on the Regional Director's report, nor on the motion and exceptions filed by the employer and the aforementioned employees.

/s/ Frank M. Kleiler
Frank M. Kleiler
Executive Secretary

Subscribed and sworn to before me
this 8th day of June 1955.

/s/ Eugene A. Keeney
Eugene A. Keeney
Notary Public in and for the
District of Columbia

My commission expires July 31, 1956.

47 Filed Jun 8 1955 Harry M. Hull, Clerk

Exhibit A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD

In the Matter of
SHORELINE ENTERPRISES OF AMERICA AND
SHORELINE PACKING CORPORATION
Employer ¹

and

INTERNATIONAL UNION OF UNITED BREWERY,
FLOUR, CEREAL, SOFT DRINK AND DISTILLERY
WORKERS OF AMERICA, CIO
Petitioner

CASE NO. 10-RC-2995

¹ The Petition named the Employer simply as "Shoreline Packing Corporation". The name of "Shoreline Enterprises of America" was added to the Employer's name in the Election Agreement which was executed by the parties on March 21, 1955. No amendment to the Petition was filed. The undersigned treats the Election Agreement as constituting a *de facto* amendment to the Petition.

*Report on Election, Objections to Election and
Recommendations to the Board*

Pursuant to the provisions of a Stipulation for Certification upon Consent Election, hereinafter called the Election Agreement, executed by the parties² an election by secret ballot was conducted on April 4 and April 5, 1955, under the direction and supervision of the undersigned, among certain employees of the Employer to determine whether or not they desired to be represented by the Petitioner for purposes of collective bargaining.

Upon the conclusion of the election, a Tally of Ballots was furnished to the parties pursuant to the Board's
48 Rules and Regulations. The Tally of Ballots showed that there were approximately 145 eligible voters; that 58 valid votes were cast for the Petitioner; that 55 valid votes were cast against the Petitioner; and that one ballot was challenged. Thus, the one challenged ballot was not sufficient to affect the results of the election.

On April 11, 1955, the Employer filed timely objections to the election, hereinafter called the Objections, supported

² See footnote 1 as to Employer's identity. A Notice of Hearing was issued by the undersigned on February 15, 1955, and a hearing was held before a Hearing Officer on March 3, 1955. While the matter was pending before the Board for decision, the Election Agreement was executed by the parties. Thereafter the Board remanded the proceeding to the undersigned who then approved the Election Agreement on March 25, 1955.

While the subject case was pending before the Board, the Petitioner filed an unfair labor practice charge (Case 10-CA-2268) alleging violations of Section 8 (a)(1)(2) and (5). Pursuant to an agreement between the parties to which the undersigned was not a party, a withdrawal request in Case No. 10-CA-2268 was submitted on March 21st (the day on which the Election Agreement was executed). It was approved by the undersigned on March 24th and, as set forth hereinabove, the Election Agreement was approved the following day.

by several affidavits. A copy of the Objections was served by the Employer upon the Petitioner, who acknowledged receipt of and filed an answer thereto, with copy to the Employer.

Pursuant to the provisions of Section 102.61 of the Board's Rules and Regulations, an investigation into the issues raised by the Objections has been conducted under the direction and supervision of the undersigned who, having carefully considered the results thereof, makes the following report and recommendations to the Board:

*Alleged Electioneering at the Polls*³

One witness testified to the effect that while in the line of voters, approaching the checking table, the witness heard "some chattering in the long line—'vote for the union'." No other witness testified as to such matters. The Board agent heard no such electioneering and none of the observers reported hearing such. The alleged electioneering was not reported to the Board agent by the witness and there is no allegation that such a report had been made.

Another witness was one of the Employer's observers. She was stationed near the ballot box and the voting booths, together with an observer for the Petitioner. The witness testified that on several occasions she heard one of the Petitioner's observers remark, "That's the kind of vote I like," or words to that effect, as some particular voters would deposit their ballots in the ballot box. The Petitioner's observer in question, Cecere, was in Ohio at the time of the investigation and was not interviewed dur-

³ No allegation of such electioneering was contained in the filed Objections. However, some evidence with respect to alleged electioneering was disclosed during the investigation. The facts are reported for the Board's consideration. *Hobart Manufacturing Company*, 92 NLRB 203.

ing the investigation.⁴ The Board agent states that
 49 the Employer's observer did not call such incidents
 to his attention, and the witness does not allege
 that she did so. The complaining observer signed the
 standard Certification on Conduct of Election.

Under the circumstances, the undersigned is of the opinion that no material or substantial issue is raised by the described incidents.

*Alleged Threats of Violence and Other Coercion*⁵

Several witnesses submitted by the Employer testified to the effect that they had heard various rumors as to possible violence or economic reprisals. The undersigned is of the opinion that rumors, which are but hearsay upon hearsay, raise no material or substantial issues with respect to the results of the election.

One witness testified that "shortly after the union talk started", a named employee told the witness that if the witness did not vote for the Petitioner, the witness "would be sorry". Aside from the question of whether or not the employee making the statement was an agent of the Petitioner, the statement that the employee "would be sorry" in the opinion of the undersigned is so ambiguous that on its face it does not contain any threat. The implication could as readily be that the employee would

⁴ The Petitioner submitted an affidavit from Cecere, based on another matter. Cecere's affidavit did not touch upon this issue, the existence of which was unknown to the Petitioner.

⁵ Petitioner urges that as to this allegation the Objections do not meet the requirements of the Board's Rules and Regulations in that it allegedly does not contain a short statement of the reasons. The Objections alleged that the Petitioner did "threaten, restrain, coerce and intimidate certain employees . . .". In the opinion of the undersigned, this is sufficient to meet the requirements of the Rules and Regulations. *Gastonia Weaving Company*, 103 NLRB 1200.

be sorry for having rejected the benefits of collective bargaining. In any event, the Petition in this case was filed on February 14, 1955, and the Petitioner's evidence of interest was secured prior to that date. This not only was two months before the date of the election, but was more than a month prior to the execution of the Election Agreement. In the opinion of the undersigned, statements made at such period of time may not be considered in support of the objections.⁶

50 The same witness testified to a "prior" conversation, along the same line with another employee. Another employee testified that "when the Union first started" a union member stated that if the employee did not sign for the Union, she would be sorry. Another witness testified that "about a month before the election" an alleged threat was made. Another employee testified that "shortly after the Union started, when cards were being passed out", an alleged threat was made. Still another employee testified that "about 3 weeks before the election" an alleged threat was made.

For the reason discussed above, the undersigned is of the opinion that none of these alleged incidents raise any material or substantial issue with respect to the results of the election.

One witness testified that on some unknown date, not even approximately established, an employee, unidentified, said that during "some strike" there had been puncturing of tires and similar incidents. The witness testified that she stated that in the event of a strike she would come to work even if she had to get a boat and come

⁶ *The Great Atlantic & Pacific Tea Company*, 101 NLRB 1118. While it is true that the witness did not place the date of the incident as being prior to the filing of the Petition, it was "shortly after the union talk started", which would appear to place the time as approximating that during which the Petitioner's evidence of interest was secured.

across the bay, whereupon one of the unidentified employees stated that if anyone did that, "they" would throw them back in the bay. In view of the inability to place this incident as having occurred after the execution of the Election Agreement, and in view of the failure to identify the speaker, the undersigned is of the opinion that this incident raises no material or substantial issues, and that it is unnecessary to consider whether the alleged statement conveyed a threat.

A witness testified that about a week and a half before the election (which would be after the execution of the Election Agreement), an employee told the witness that if the witness did not vote for the Petitioner, the witness would be sorry. There is no showing that the employee making the alleged statement was an agent of the Union. In addition, as discussed hereinabove, the undersigned is of the opinion that the expression "would be sorry" is ambiguous. For these reasons, the undersigned concludes that this incident raises no material or substantial issues.

A witness testified that "about two weeks before the election", a named employee asked the witness to
51 sign a card for the Petitioner. The employee soliciting the card was a member of the Petitioner's committee, the status of which will be discussed hereinafter. The witness asked the committee member if the witness would be allowed to work if she did not sign. The reply was that the witness would not be fired, but that "they" might make it hard on those that did not join; that is, "they" would pick the harder jobs for those that did not join. This witness also testified that she asked what would happen if there was a strike and employees tried to go in, and the committee member told "of things that have happened in strikes at other places". A second witness testified to a conversation, at about the same time, with the same committee member, who told this witness that if a raise was given and the Petitioner "came

in", only the union people would get the raise. The committee member also allegedly told this witness that "they" were going to see that some of those who did not join the Petitioner would be laid off.

As stated above, both witnesses placed these incidents as being "about two weeks before the election". The election was held on April 4 and 5, and the Election Agreement was executed on March 21 (approved by the undersigned on March 25). Thus, "about two weeks before the election" might be either just before or just after the execution of the Election Agreement.

No evidence was presented by the Employer to the effect that the employee making the alleged statements was an agent for the Petitioner. The investigation disclosed that under date of February 9, 1955, the Petitioner addressed a letter to the Employer's Vice President, Mr. Billy Hice, reading, in part, as follows:

As per your suggestion this noon, please consider this letter as a formal request for a meeting with you to discuss the recognition of this Union as the bargaining agent for the employees mentioned in an earlier telegram.

As a tentative date, I would like to suggest Tuesday, February 15. I would like to include in this meeting the following persons who have been designated as a committee representing your Employees:

52 The quoted letter then named eight employees and ended by stating, "I would appreciate an early reply in regards to this matter." The employee making the statements in question was one of the named committee members.

The possible timeliness of the incident and the possibility that such committee membership may create an agency relationship appears to raise material and sub-

stantial issues. However, because of another factor, the undersigned is of the opinion that the incidents in question do not raise material or substantial issues with respect to the results of the election. Thus, the alleged threats did not involve physical violence, but only economic reprisals. Obviously, such threats could not be carried out without the acquiescence and cooperation of the Employer. The investigation revealed, however, that the Employer had held at least one meeting of its employees, and that the employees had been told not to worry about losing their jobs, whichever way the election went.⁷ The Employer having made it clear that employees' status would not be jeopardized regardless of the outcome of the election, any threats that may have been contained in the described statements by the committee member appear to have been neutralized and negated. The undersigned, therefore, concludes that the alleged statements raise no material or substantial issues with respect to the results of the election.

A witness testified that during the week before the election, she and others were talking to several union adherents and one of the latter said that during a strike sugar could be poured in gas tanks or cars could be cut up. Another witness, testifying apparently to the same incident, stated that one of the named union adherents told them that in case of a strike, non-union workers could get acid poured on them or that anything could happen; houses or cars could get burned. None of the union adherents identified were members of the union committee discussed hereinabove. Inasmuch as no agent of the Petitioner was identified as being involved, the undersigned is of the opinion that the incident raised no ma-

⁷ The estimates as to when such talk was made by the Employer varied widely. The undersigned is of the opinion that it is unnecessary to establish the time definitely.

terial or substantial issue with respect to the results of the election.

53 In summation, the investigation disclosed evidence of certain rumors, both as to alleged threats of physical violence and as to alleged threats of economic reprisal. The investigation revealed certain specific alleged incidents of both types of threats which occurred prior to the execution of the Election Agreement and, hence, were untimely. Two incidents (possibly they were both part of the same discussion) involved a member of the Union's committee in an alleged threat of economic reprisal. It is not clearly established that the incident occurred after the execution of the Election Agreement and, in the opinion of the undersigned, the Employer negated the effect of any threats of economic action. The investigation disclosed one timely incident which did not involve a member of the Petitioner's committee and in which the threat was only that the employee "would be sorry". And, finally, the investigation disclosed one timely incident (two witnesses) where union adherents told of physical violence that could occur in the event of a strike, but where none of the union adherents are shown to be members of the Petitioner's committee or otherwise an agent of the Petitioner. Agency responsibility cannot be predicated upon the degree of fervor appearing in a rank-and-file employee's election activity.⁸ The under-

⁸ *J. J. Newberry Company*, 100 NLRB 84. In *Southdown Sugars*, 108 NLRB No. 17, the Board did say that it is immaterial whether the violence and threats of violence can be attributed to the Petitioner; citing *Diamond State Poultry*, 107 NLRB No. 19. However, the circumstances of the latter were drastically different from those herein involved. In the former, the details of the violence and threats of violence were not given. Inasmuch as the Board failed to state that this was a newly adopted general policy and inasmuch as it failed to overrule the *Newberry* decision or others in a long line to the similar effect. (See, e.g., *Standard Coil Products Company, Inc.*, 100 NLRB No. 113, not reported; *E. I. Du Pont de Nemours & Co., Inc.*, 105 NLRB 710; *Benton Cloak &*

signed is of the opinion that the evidence with respect to this objection is insufficient to raise material or substantial issues and, therefore, shall recommend to the Board that the objection be overruled.

The Petitioner's observers allegedly were paid organizers. In its second objection, the Employer alleges that the two observers for the Petitioner, Betty Lou Cecere and Joseph Hamilton, were and are organizers for
54 the Petitioner.

In support of this allegation⁹, the Employer alleges that Cecere was hired by the Employer on the day that the Petitioner first informed the Employer of its organizational efforts and that she resigned the day following the election; informing the Employer that she was leaving for Cincinnati, Ohio. The Employer pointed out that the international office of the Petitioner is in Cincinnati. From these facts, the Employer concludes that Cecere was an organizer for the Petitioner.

During the investigation, one of the Employer's observers, Ruth DePratter, testified that during the voting she and Cecere were seated near each other; that Cecere asked her if she had ever "worked the polls" before; that she had replied in the negative; and that Cecere had replied, "Well, it's lots of fun. I used to work the polls at \$12.00 per day." Admittedly, Cecere did not mention what kind of polls were involved, but DePratter "understood it to be a labor polls election".

Suit Company, 97 NLRB 1327; *Marmon Bag Company*, 103 NLRB 456; *A. Werman & Sons, Inc.*, 106 NLRB 1215.) Under these circumstances, the undersigned concludes that the general principle remains intact and that the *Southdown* and *Diamond State* cases were distinguishable on their facts.

⁹ The allegation presumptively carries with it the connotation that the two observers were not *bona fide* employees of the Employer and, therefore, that they were ineligible to serve as observers under the terms of the Election Agreement.

The investigation further revealed that Cecere had, prior to the election, requested permission or otherwise had arranged to go to Ohio in connection with a divorce proceeding.¹⁰

The investigation also revealed an alleged rumor that Hamilton was paid by the Petitioner and that Cecere was to receive \$300 if the Petitioner won the election.

Except as to the existence of the alleged rumors, no evidence was presented by the Employer, nor disclosed by the investigation, to the effect that Hamilton was paid by the Petitioner. Hamilton is still in the Employer's employ.

The Petitioner denies that either Hamilton or Cecere was on its payrolls.

55 The undersigned is of the opinion that no material and substantial issue is raised by this allegation and, therefore, shall recommend to the Board that it be overruled.

Four employees were allegedly deprived of their right to vote. The Employer alleges that four employees, who allegedly were eligible voters, were denied the right to vote. The employees in question were Joe Diaz, Billy Traina, Ruth DePratter and Vera Mobley.¹¹

¹⁰ As stated hereinabove, Cecere was in Ohio at the time of the investigation and was not interviewed by the field examiner conducting the investigation. The Petitioner submitted an affidavit signed by Cecere (furnishing the Employer with a copy of said affidavit). The affidavit did not, however, relate to the issue here involved. The undersigned is of the opinion that the allegation of the objections and the lack of prima facie evidence in support of it do not necessitate further investigation in this respect.

¹¹ After the election, the undersigned received a letter from the four employees in question, alleging that they had been deprived of their alleged right to vote. No copies were shown to have been served on the parties to the proceeding and no additional copies were filed with the undersigned pursuant to Section 102.61 of the

The Employer admits in the Objections that it was agreed by the Employer and the Petitioner that the four employees in question were ineligible to vote and that their names had been stricken from the eligibility list pursuant to such agreement. This would appear to dispose of the matter, but the Employer alleges that it was misled into so agreeing by a field examiner for the Board and by the Petitioner's representative. It appears necessary, therefore, to determine the circumstances surrounding the execution of the Election Agreement.

The Election Agreement was reached at a conference held in the office of the Employer's attorney, Granville M. Alley, Jr., who represented the Employer at the conference. The Petitioner was represented by Edward Gerchak, international representative. The field examiner was Arthur P. West. There was tentative agreement between the parties for an election, but there was some disagreement between Alley and Gerchak; the Petitioner claiming that DePratter and Traina were supervisors, with the Employer denying this. The Petitioner also contended the DePratter and Traina, as well as Mobley, were plant clerical employees and that they should be excluded from the unit. The Employer conceded that they were plant clerical employees but initially refused to consent to excluding them.

56 There was also disagreement between the Petitioner and the Employer as to the status of Diaz, the truck driver; the Petitioner desiring to exclude and the Employer refusing to agree.

Board's Rules and Regulations. In view of these facts and particularly because none of the employees in question were parties to the proceeding and the letter did not allege any improper conduct by a Board agent, the undersigned did not treat the letter as constituting objections within the meaning of the Board's Rules and Regulations.

Field Examiner West informed the parties that unless an agreement was reached, a determination as to the unit must be made by the Board.¹² The investigation disclosed that Alley thereupon telephoned his client, in the presence of West and Gerchak; spoke to Vice-President Billy Hice; discussed with Hice the problem involved, naming specifically the employees who were in dispute; and thereafter agreed to the exclusions. The Election Agreement was thereupon prepared showing the bargaining unit to consist of "all production and maintenance employees including refrigeration engineers; excluding truck drivers and excluding all office employees and all clerical employees, professional employees, guards and/or watchmen and supervisors as defined in the Act." The Election Agreement was signed by Gerchak on behalf of the Petitioner and by Attorney Alley on behalf of the Employer.

In its Objections, the Employer alleges that Field Examiner West informed Alley, during this conference, that he was satisfied that DePratter, Mobley and Traina were clericals and not entitled to vote, and that Diaz was a truck driver and not entitled to vote. The Employer further alleges in the Objections that "relying on the statement by . . . West . . ." the Employer's attorney agreed with the Petitioner's representative that the four employees were not eligible to vote.¹³

Field Examiner West and International Representative Gerchak both deny that West made any statements to that effect. Alley, the Employer's attorney who partici-

¹² As stated hereinabove, the matter was pending for decision before the Board after a hearing. See footnote 2.

¹³ As will be set forth in more detail later, the issue as to eligibility involves an allegation that all four of the employees in question perform a substantial amount of production work in addition to the clerical or truck driving work.

pated in the said conference and who is a member of the firm which filed the Objections, refused to give a signed statement in connection with the matter.

57 Under the circumstances¹⁴, therefore, the undersigned credits the undisputed sworn testimony of West and Gerchak and is of the opinion that Alley was not misled and was not in ignorance of the facts, as he alleges, and that Field Examiner West did not "rule" or "decide".

¹⁴ The undersigned takes cognizance of the fact that, as admitted in the Objections, a hearing was held in this case and that testimony was taken with respect to the duties of at least some of the plant clericals here involved and as to the duties of the truck driver. Alley represented the Employer at the said hearing. The undersigned takes note of the fact that although the Employer usually refused to take a position with respect to questions raised by the Hearing Officer, the Employer did take positions with respect to the status of the truck driver and of the plant clerical employees. Thus, on page 39 of the transcript, the Petitioner stated a desire to include the truck driver in the unit, whereupon Alley objected to amendment of the Petition to include the truck driver. After some discussion, the Petitioner withdrew its claim to include the truck driver, to avoid complications. Alley, on behalf of the Employer, objected to that also. After further discussion, the Petitioner stated that it would abide by the Board's decision in the matter, whereupon Alley objected to that also. (Page 41, lines 11-14)

With respect to the plant clericals, Alley took the position that plant clericals were not petitioned for and, therefore, were not within the unit. (Tr., page 60) After further discussion, the Petitioner took the position that it would leave the determination to the Board and that it had no contention with respect to the matter, whereupon Alley replied, "Then we object. I don't know what we are objecting to."

The Board has already dealt with the issue of an Employer contending that it should not be held to a stipulation to exclude certain employees because of alleged ignorance of their duties when it entered into the stipulation, and has rejected such contention. *Stanley Aviation Corporation*, 112 NLRB No. 61. In the case now at bar, less justification would appear to exist than was found in the *Stanley* case. Here there was first a hearing and then the Election Agreement was executed two and a half weeks later.

Again, it would seem that the issues raised by the allegations had been disposed of, but again the Employer makes additional allegations that require further consideration. In the interest of clarity, the status of the four employees in question will be considered separately.

Joe Diaz: As set forth hereinabove, Diaz was the truck driver whose exclusion was agreed upon. With the Objections, the Employer submitted an affidavit by Diaz purporting to show that Diaz engaged in a substantial amount of production work, as well as driving the truck.¹⁵ Diaz, during the investigation, testified

58 that he did not go to the polls to attempt to vote.

Inferentially, he attributed his failure to appear at the polls to the fact that Vice-President Hice had told him, a week before the election, that he could not vote. Hice testified during the investigation that he had so informed Diaz because he had been so informed by Attorney Alley. He stated to Diaz that he believed the Petitioner had changed its petition to exclude the truck driver and Field Examiner West had ruled that Diaz would be excluded and, therefore, not eligible to vote.

Having concluded, as set forth hereinabove, that Field Examiner West neither ruled that any employees were not eligible nor misled Attorney Alley, the undersigned is of the opinion that the Employer is without standing to now object to the results of the election based on its own action in informing an allegedly eligible voter that he was not eligible to vote.¹⁶ But, as indicated above, the

¹⁵ No investigation has been made with respect to the extent to which Diaz (or any of the others involved) do engage in production work as, in the opinion of the undersigned, such determination is not essential to a disposition of the matter.

¹⁶ When Attorney Alley refused to give a statement during the investigation, he informed the field examiner who was making the investigation that he preferred that the issues be decided not on the basis of who said what, but on the fact that some employees, probably eligible to vote, were told by the Employer not to vote.

Employer goes further in this matter. Vice-President Hice states in an affidavit that just prior to the opening of the polls the field examiner who was conducting the election (Alexander E. Resin) "instructed" Hice and Alley that the four employees in question should not appear at the polls; that if they did appear he would "just send them right back to the plant" and that they would not be permitted to cast a ballot even if they appeared. He further avers that he returned to the plant and advised the Plant Manager that Field Examiner Resin had specifically stated that the four employees should not appear at the polls and that the Plant Manager should therefore be certain that they did not go to the polls. The affidavit taken from Diaz during the investigation revealed however, that no one except Hice told him that he could not vote. Diaz' failure to appear at the polls could not, therefore, be attributed to the statement allegedly made by Resin (which will be adverted to further herein-after), even assuming, *arguendo*, it had been made.

59 With respect to Diaz, therefore the investigation reveals clearly that Diaz did not appear at the polls and attempt to cast a ballot,¹⁷ because he was told by his Employer that he was not eligible to vote, rather than because of any action or statement made by either Field Examiner West or Field Examiner Resin.

Billy Traina: Traina testified during the investigation that she did not attempt to vote because she had been told by Hice that she could not vote; and that this information had been given to her during the week before the

¹⁷ The standard Notice of Election, which was posted in connection with this election, provides that "Any employee who desires to obtain any further information . . . or desires to raise any question concerning the holding of an election, the voting unit, or eligibility rules, may do so by communicating with the Regional Director or his agent in charge of the election." Diaz made no effort to seek official information as to his status.

election and also on the day of the election. As to the latter, she testified that Hice told her that he had been informed that she was ineligible to vote.

In view of the fact that Traina, unlike Diaz, attributed her failure to attempt to vote to information received on the day of the election, it becomes necessary to examine the evidence with respect to what occurred on that date.

Hice's version of the incident has already been set forth above.¹⁸ In further support of the Employer's position, one of its observers, Ruth DePratter, testified that during the instructions given by the Board agent to the observers, the Board agent said that if the three people (Diaz, Mobley or Traina) appeared at the polls they would be sent back and would not be permitted to vote, but that she was told that she would be permitted to remain because she was an observer. DePratter further testi-

60 fied that she believed that Examiner Resin first asked the company representatives if the employees in question had been informed that they could not vote and the reply was in the affirmative.¹⁹

The Employer also submitted as a witness its other observer, Ruth Drum. Drum stated that Field Examiner

¹⁸ The undersigned is of the opinion that Hice's statement of what transpired is not credible on its face. Thus, he testified that the field examiner informed him that the four employees were not to be permitted to come to the polls and that he sent word to the Plant Manager to see that they did not go to the polls. However, one of the four employees in question was already at the polls to serve as an observer for the Employer. It is, therefore, hardly logical that Field Examiner Resin would have "instructed" Hice and Alley that the "four" employees were not to be permitted to come to the polls.

¹⁹ DePratter thus contradicts Hice in part. Hice said that Field Examiner Resin referred to "four" employees, while DePratter stated that the field examiner referred to only three. DePratter referred to some discussion pertaining especially to herself, whereas Hice is silent on that subject.

Resin briefed those present on how the election was to be conducted, what the duties of the observers would be, and stated that if anyone not eligible to vote came into the voting area during the time the polls were open, "The election would be invalidated". According to her, Examiner Resin emphasized this by saying that it included representatives of the Company, the Union, any supervisors, "clerical help or any one considered ineligible to vote". Drum, however, does not allege that there was any discussion of either the three or the four individuals and stated that she did not recall that there was any such discussion.²⁰

In opposition to the three mutually-contradictory witnesses of the Employer, Field Examiner Resin testified under oath that there was no discussion at the conference in question with respect to the four employees involved. This is supported by two union representatives who were also present and by the two union observers who were present.²¹

²⁰ Although Drum and DePrater were the Employer's witnesses, the Employer insisted on being present when the witnesses were interviewed by the examiner. Although no such right exists, and such insistence would have been adequate grounds for refusing to proceed further in the matter, the field examiner permitted Attorney Alley to be present. Thereafter, Alley instructed the witnesses not to sign affidavits prepared by the field examiner and undertook to prepare affidavits for their signatures and submit them subsequently. When Drum was interviewed, she made no mention of the alleged statement that the election would be invalidated if any non-eligible persons entered the polling area. Attorney Alley told her that he wanted her to think further about the matter. When Drum's affidavit, prepared by Alley, was submitted, it contained the statement under discussion. For these reasons the undersigned is of the opinion that no great weight should be accorded the testimony of either of the two witnesses.

²¹ As indicated hereinabove, one of the Petitioner's observers, Cecere, has not been interviewed during the course of the investigation, but an affidavit pertaining to these issues was submitted by the Petitioner. As Cecere's affidavit was not obtained through

61 Alley, the Employer's attorney, who was also present at the time, refused to make a statement.

In view of the agreement between the field examiner and the Petitioner's representatives and observers on the one hand, and the mutual contradiction among the Employer's witnesses, coupled with the refusal of its attorney to give a statement, the undersigned is of the opinion that Field Examiner Resin not only did not "instruct" the Employer that the employees in question were not to be permitted to come to the polls, but that there was no discussion concerning them at that time.²²

In the light of the foregoing, the undersigned is of the opinion that Traina did not refrain from attempting to vote because of any statements made or action taken by Field Examiner Resin. In view of this, and in view of the earlier conclusion that the Employer entered into the Election Agreement with full knowledge of what it was doing, rather than being misled by Examiner West, the undersigned is of the opinion that Traina's refraining from attempting to vote can be attributed only to

interview by a Board agent, the undersigned is unable to give it any weight other than that it corroborates the other observer, who was hundreds of miles away at the time and who was interviewed by the Board agent.

²² Field Examiner Resin had met with Alley and Hice on the previous Friday, April 1, concerning the election arrangements. At that time, there was a discussion as to the employees in question. One of the Employer's representatives asked Resin whether the employees in question should come to the polls. Resin pointed out that they had been excluded; that if they believed they were eligible to vote, they could cast challenged ballots; but that the casting of challenged ballots might affect the results of the election and delay a definite determination as to the outcome of the election. None of the observers was present. The conversation took place after the Employer's working hours. Hice may have misunderstood, and may have confused the two incidents, but this could not have been true as to DePratter.

the Employer's own actions, about which it now complains.

Ruth De Pratter: DePratter was one of the Employer's observers at the election polls. She admittedly did not attempt to cast a ballot. She attributes her failure to do so to, in part, the fact that she had been informed by Vice-President Hice that she was not eligible and to the policy allegedly announced by Field Examiner Resin at the pre-election conference, when the observers received their instructions.²³ Having concluded that neither Field Examiner West nor Field Examiner Resin had, in fact, taken the positions alleged by the Employer, the undersigned concludes that there is no evidence to indicate thus far that DePratter refrained from attempting to vote because of any action taken by a Board agent. However, DePratter advanced a further reason for failing to attempt to vote; i.e., the statements allegedly made by Field Examiner Resin when the fourth of the employees in question (Mobley) did appear at the

²³ Certain inconsistencies in the testimony of Hice and DePratter with respect to the pre-election conference have already been pointed out hereinabove. There were other inconsistencies with respect to when DePratter received word from Hice that she was not eligible to vote, and the nature of the information given.

Thus, Hice stated that he had informed DePratter (and some of the others) a day or so prior to the election and again on the morning of the election that they would not be eligible to vote. DePratter, however, states that the first information to that effect that she had was on noon on the day of the election, when Hice inquired whether she would serve as an observer for the Employer.

Although there is some ambiguity, Hice's version indicates that he informed DePratter (and the others) of their ineligibility because he was advised by Alley that they were ineligible to vote. DePratter's version of what happened indicated that she was so informed only when she inquired, after agreeing to serve as the Employer's observer, whether she would be eligible to vote. Even then, according to her, Hice had to telephone to his office and make inquiry before informing her that she was not eligible.

polls. It is, therefore, necessary to turn at this point to a consideration of this issue.

Vera Mobley: Mobley was the only one of the four employees in question who appeared at the polls seeking to vote.²⁴ According to Mobley, Field Examiner Resin told her that she could cast a ballot, that it didn't make a "darn bit of difference" to him, but that it would not be counted. She did not recall that he used word "challenge". Mobley left without voting.

The evidence as to what actually was said is in conflict. Field Examiner Resin stated that the observers informed him that Mobley's name had been stricken from the list; that he asked Mobley what her job was; that she replied that in addition to doing production work she was a clerical in the plant, a timekeeper; that he advised her that the Employer and the Petitioner had agreed to exclude plant clericals; that she could vote a challenged ballot, however; but if, after investigation, it was determined that she belonged to the excluded group, her vote would not be counted. He started to prepare a challenged ballot envelope, but Mobley left and did not return. The fact that Resin told Mobley that she could vote a challenged ballot if she wanted to was corroborated by the observers (both Employer's and Petitioners) who served at the checking table. The Petitioner's observer testified further that Examiner Resin stated that there would be a chance that the ballot would be thrown out following an investigation later. The Employer's observer testified that Resin's statement was that the ballot would just be thrown away, because Mobley was a clerical employee. Three employees who were in line close to Mobley were interviewed during the in-

²⁴ Vice-President Hice testified during the investigation that to the best of his recollection he advised Mobley that she was not eligible to vote. According to Mobley, however, the first knowledge she had to that effect was when she appeared at the polls.

vestigation. One stated that she did not hear Resin say anything about investigating or about a challenge, and a second stated that she did not recall whether Resin used such words. In substance, both understood Resin to indicate that the ballot would not be counted, and this was the understanding also of a third.

While the undersigned is convinced that Field Examiner Resin correctly informed Mobley as to her rights and as to the possible disposition of the ballot, it is apparent that not only Mobley but other voters received the impression that Mobley's vote would not be counted but would be simply wasted.²⁵

From the foregoing facts, it may be concluded that a material and substantial issue was raised with respect to whether or not Mobley was discouraged from voting by action of the field examiner. Inasmuch as DePratter allegedly refrained from attempting to vote because of this incident, as well as because of prior notification from the Employer, the same conclusion would apply to DePratter. Their ballots, had they been cast, would have been sufficient to affect the results of the election.²⁶

64 There remains for consideration the issue of whether any party was, in fact, prejudiced by the deprivation of the right to vote assuming, *arguendo*, that such occurred.

As set forth hereinabove, and as urged by the Petitioner in its "Answer", not only did the Election Agreement executed by the Employer and the Petitioner ex-

²⁵ Such failure to understand may have been caused by some vocal emphasis or lack thereof, by extraneous noise, by inattention, or by other factors. It is to be noted that another voter was challenged, voted a challenged ballot, and no issues arose.

²⁶ There were 58 valid votes for the Petitioner, 55 against the Petitioner, and 1 challenged ballot in addition to those which would have been cast by Mobley and DePratter.

clude the affected employees by job classifications", but the voting list was agreed to by the parties and the names of DePratter, Mobley, and Diaz were stricken from the list by agreement of the parties.²⁸ Thus, the parties agreed to the exclusion of the four by name, as well as by general job description.

According to Field Examiner West, the discussion which preceded the execution of the Election Agreement brought out the fact that three of the four employees in question did perform production work during part of their work hours, in addition to performing their clerical work or truck driving.²⁹ In effect, DePrater, Mobley and Traina were part-time plant clerical employees and part-time production workers, and Diaz was a part-time truck driver and a part-time production worker.³⁰ In view of the fact that the parties were agreeing to exclude not only by general job descriptions but by individual name, it is the opinion of the undersigned that the four employees in question were excluded from the bargaining unit even though they were part-time production employees. Being excluded, they were not eligible to vote and, hence, no party was prejudiced by their failure to cast votes regardless of whether or not such failure
 65 to vote was caused by any action of the field examiner.³¹

²⁷ Excluded were "truck drivers" and "all clerical employees". (Emphasis supplied.)

²⁸ Traina's name was never included in the list as prepared by the Employer. Apparently the Employer was already of the opinion that Traina was not an eligible voter.

²⁹ The evidence at the hearing revealed that at least one of the employees (Traina) participated in production work as well as keeping records. (Transcript, page 57, lines 18-21.)

³⁰ At the hearing, the Employer's Plant Manager testified that Diaz' time "is almost entirely devoted to driving the truck".

³¹ The fact that the Board probably would have included these employees within the unit, had the case been decided by the Board

CONCLUSIONS AND RECOMMENDATIONS:

As set forth hereinabove, the undersigned has concluded that neither the unalleged evidence as to electioneering at the polls or the evidence with respect to the alleged threats of violence and coercion is sufficient to raise a material and substantial issue with respect to the results of the election. As also set forth hereinabove, the undersigned is of the opinion that no material and substantial issue is raised with respect to the allegation that the Petitioner's observers were organizers for the Petitioner.

With respect to the allegation that four named employees were deprived of their right to vote, the undersigned has concluded that there is a material and substantial issue with respect to the happenings at the polls, bearing on that issue. However, the undersigned has also concluded that none of the four persons involved were eligible voters and, hence, that no party was prejudiced by such deprivation if it in fact did occur.³² The under-

rather than being resolved by agreement, is not controlling. The Board has a well-established policy of honoring concessions made in the interest of expeditious handling of representation cases in general. *New York Shipping Association and Its Members*, 109 NLRB No. 162; *Stanley Aviation Corporation*, 112 NLRB No. 61. Furthermore, the Board has recently adopted and publicized a policy whereby regular part-time employees will be excluded from a unit where the parties have stipulated for their exclusion. *Bachman Buxbridge Worsted Corporation*, 109 NLRB No. 135. The parties, having known that the employees in question were regular part-time employees with respect to the group in the unit and nevertheless having agreed to exclude them by name, they must be presumed to have agreed to exclude them as regular part-time employees. It is true that the Election Agreement did not reflect this, but faulty draftsmanship should not be controlling.

³² Although normally objections pertaining to eligibility to vote will not be considered, the circumstances presented in this case differ from the usual case where such issue arises. In the opinion of the undersigned, it would be administratively unwise and wasteful to hold a hearing on the subject of whether the employees were deprived of their right to vote if, in fact, no such right existed.

signed therefore recommends to the Board that the Objections be overruled in their entirety.

66 The election having been conducted pursuant to the Election Agreement and to the Board's usual practice and policies, the Petitioner, having received a majority of the valid votes cast, the challenged ballots being insufficient in number to affect the results of the election, and the Objections being without merit (assuming adoption by the Board of the foregoing recommendations), the undersigned further recommends that the Board certify that the Petitioner is the exclusive representative of the Employer's employees in the unit stipulated to be appropriate.

Signed at Atlanta, Georgia, this 16th day of May 1955.

/s/ John C. Getreu
John C. Getreu
Regional Director, Tenth
Region
National Labor Relations
Board

89 Filed Jun 10 1955 Harry M. Hull, Clerk

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Affidavit of Billy D. Hice

90 *An Affidavit*

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH)

BEFORE ME, the undersigned authority, personally appeared BILLY D. HICE, who, being by me first duly sworn, deposes and says:

I am the Vice-President of SHORELINE ENTERPRISES OF AMERICA and SHORELINE PACKING CORPORATION. On March 21, 1955, the day the stipulation for consent election was entered into, Mr. Alley

consulted with me on the telephone during the conference. He told me that the Union was insistent that the unit exclude plant clerical workers and that this would probably exclude DePratter, Traina and Mobley. He did not say anything to me about them being excluded as part-time employees and there was no intention that DePratter, Traina, Mobley and Diaz would be excluded on the basis that they were part-time employees.

Some time after March 21, I was advised by Mr. Granville Alley, attorney for the company, that four employees, Ruth DePratter, Billie Traina, Vera Mobley and Joe Diaz, were ineligible to vote in the forthcoming union election. Mr. Alley informed me that the company had agreed to excluding plant clericals and truck drivers from the bargaining unit. He told me that N.L.R.B. Agent West had informed him that DePratter, Traina, Mobley and Diaz would not be eligible to vote because they were in the excluded category.

I told Billie Traina, Ruth DePratter and Joe Diaz prior to the election that I had been advised they would not be allowed to cast a ballot in the election. To the best of my recollection, I also advised Vera Mobley that she had been stricken from the eligibility list and would not be allowed to cast her ballot in the election which had been set for April 4th and 5th, 1955.

The three women asked why they would not be permitted to vote and I told them that I understood the union claimed that they were clerical employees and therefore would not be eligible to vote; and that Mr. Arthur West of the N.L.R.B. decided that they were clericals and therefore not eligible to vote. I assumed that

91 Mr. West's decision in the matter was final and therefore did not discuss it any further at that time with the employees.

Mr. Joe Diaz, truck driver, asked me why he was not being allowed to vote and I told him that I believed the union had changed their petition to exclude the truck driver; and that Mr. West had ruled that he would be excluded and therefore not eligible to vote.

On Friday, April 1, 1955, I was called by Mr. Alley and asked to meet with him, Field Examiner Resin, and Jack Fitzgerald in the Hillsborough County Port Authority Building for the purpose of discussing the use of that building in which to hold the election. Mr. Fitzgerald was present during the conversation concerning the use of the building. Either right before or right after Mr. Fitzgerald left, I told Mr. Resin that there had been quite a bit of discussion among the employees and rumors of threats concerning damage to automobiles and other dire consequences that might happen should certain employees antagonistic to the union appear at work on the following Monday, which was election day. I vigorously appealed to Mr. Resin to permit me to make a statement to the employees and offered to write the statement out for his approval, for the purpose of reassuring all employees that they need not fear to come to work on Monday. Whereupon Mr. Resin telephoned his office in Atlanta, after which he advised me that I could make such a statement, but that it would be at my own peril. I was very upset by the attitude of Mr. Resin and the obvious answer he received from his Atlanta office. I felt that if the election was to be held in an atmosphere of free choice, that certainly the National Labor Relations Board would cooperate in reassuring the employees so that they would be encouraged to express their free will.

I was concerned over what should be done concerning Traina, Diaz, Mobley and DePratter. Unless they were informed that they were ineligible to vote they would come over with the other employees when the voting began. Mr. Alley had suggested that we let them go over

with the other employees. However, I felt that if the employees were not going to be permitted to vote, 92 then we should not send them over to be embarrassed in the presence of their fellow employees. I therefore inquired of Resin as to whether or not we should let these employees come over when the other employees went to vote. Mr. Resin replied with words to the effect that he was not going to tell us what we should do about sending our employees over, but he assured us that if Traina, DePratter, Mobley or Diaz came over they would not be permitted to vote since we had agreed to their ineligibility.

On April 4, just prior to opening of the polls, Mr. Resin of the N.L.R.B., who was conducting the election, instructed myself and Mr. Granville Alley that these four employees should not appear at the polls; and that if they did appear, he would "just send them right back to the plant"; and that they would not be permitted to cast a ballot even if they appeared.

Present at this time were Mr. Resin, who was to conduct the election, two observers for the union, two observers for the company, two representatives from the union, Mr. Granville Alley and myself.

Prior to the opening of the polls, I returned to the plant and advised the plant manager to begin releasing employees, beginning at the rear of the plant, by departments, for the purpose of casting their ballots. I also advised him that Mr. Resin had specifically stated that the four employees mentioned above should not appear at the polls, and that he should therefore be certain that they did not go over there. The election was held as scheduled, on the afternoon of April 4th and the morning of April 5th.

I was later advised by my secretary, who was an observer at the election, that Vera Mobley had appeared at

the polls and had attempted to vote. I did not know why she went to the polls, as our intention was to abide by Mr. Resin's instructions. I have now learned that Vera Mobley went to vote before she reported to work.

Further affiant sayeth not.

/s/ Billy D. Hice
Billy D. Hice

Sworn to and subscribed before me this 8th day of June, 1955.

/s/ Mary Frances McDuffie
Notary Public, State of Florida at Large.
My Commission expires: Oct. 20, 1957.
Bonded by American Surety Co. of N. Y.

99 Filed Jun 28 1955 Harry M. Hull, Clerk

* * * *

Order

This case having come on to be heard upon defendants' motion to dismiss the complaint, and the Court, after considering the pleadings and the exhibits attached thereto, the legal memoranda submitted and hearing argument of counsel, having concluded that this is an action to review a representation proceeding under Section 9 of the National Labor Relations Act and the Court is thus without jurisdiction of the subject matter of the action, and that plaintiffs have failed to exhaust their administrative remedies, it is by the Court this 28th day of June, 1955

ORDERED, that the defendants' motion to dismiss the complaint be and hereby is granted, that plaintiffs' complaint herein be and hereby is dismissed, and that the tem-

67 A

porary restraining order heretofore entered be and hereby
is vacated.

/s/ Burnita Shelton Matthews
JUDGE
UNITED STATES
DISTRICT COURT

OFFICE COPY

No. 12874

BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1955

RUTH DEPRATTER, VERA MOBLEY, BILLIE TRAINA,
AUDREY MILLER, and JOE DIAZ,
Appellants,

v.

GUY FARMER, ABE MURDOCK, IVAR H. PETERSON, PHILIP
RAY RODGERS, and BOYD STEWART LEEDOM, individually
and as chairman and members of the National Labor
Relations Board,
Appellees.

Appeal from an Order of the United States District Court
for the District of Columbia

CODY FOWLER
Citizens Building
Tampa, Florida
DAVID C. BASTIAN
Colorado Building
Washington, D. C.
Attorneys for Appellants

Of Counsel:

FOWLER, WHITE, GILLEN, YANCEY and HUMKEY
1002 Citizens Building
Tampa 2, Florida
DRURY, LYNHAM & POWELL
312 Colorado Building
Washington, D. C.

*United States Court of Appeals
for the
District of Columbia Circuit*

FILED 007 14 1955

Joseph W. Stewart

STATEMENT OF QUESTIONS PRESENTED**I. THE FIRST QUESTION CONCERNS DUE PROCESS AND CONSTITUTIONAL RIGHTS, AND DUE TO COMPLEXITY WILL BE PRESENTED AS THREE QUESTIONS, WHICH WILL BE ARGUED TOGETHER.**

A. The Question is Whether the Appellants' (Individual Employees) Right to Bargain With Their Employer or to Select an Agent to Bargain for Them in Relation to Matters of Wages, Hours and Working Conditions are Liberties and Property Rights Protected by the Constitution of the United States.

The District Court answered this Question in the negative.

B. The Question is Whether the Appellants Were Denied Due Process of Law by the Action of Appellees in Unlawfully and Wrongfully Denying Certain of the Appellants, Who Were Eligible to Vote, the Right to Vote in an Election Provided by the National Labor Relations Act, as Amended, for the Purpose of Selecting or Rejecting a Bargaining Agent.

The District Court answered this Question in the negative.

C. The Question is Whether This Denial of Due Process Deprived the Appellants of Their Constitutional Rights Because the Votes of Those Certain Appellants, Unlawfully Prevented from Voting, Would Have Changed the Outcome of the Election in Which a Bargaining Agent Was Selected, Which Agent Would Not Have Been Selected Had These Appellants Been Permitted to Vote.

The District Court answered this Question in the negative.

II. THE QUESTION IS WHETHER THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA HAS JURISDICTION TO ENTERTAIN A SUIT IN EQUITY BASED ON A COMPLAINT ASSERTING THE INFRINGEMENT OF CONSTITUTIONAL RIGHTS, NOT TRANSPARENTLY FRIVOLOUS, OF CITIZENS OF THE UNITED STATES BY THE NATIONAL LABOR RELATIONS BOARD AND ASKING FOR AFFIRMATIVE RELIEF TO ENJOIN SUCH INFRINGEMENT, NO OTHER METHOD OF REVIEW BEING AVAILABLE TO THE APPELLANTS.

The Trial Court answered this Question in the negative.

III. THE QUESTION IS WHETHER THE APPELLANTS (EMPLOYEES) WHO HAVE NO ADMINISTRATIVE REMEDY AND WHO HAVE NO RIGHT TO BE A PARTY TO ADMINISTRATIVE PROCEEDINGS INSTITUTED BY ANOTHER (THE EMPLOYER), WHICH PROCEEDINGS CAN IRREPARABLY INJURE OR DESTROY THEIR CONSTITUTIONAL RIGHTS, MUST AWAIT THE FINAL OUTCOME OF THE ADMINISTRATIVE PROCEEDINGS AND THE DESTRUCTION OF THEIR CONSTITUTIONAL RIGHTS BEFORE INSTITUTING COURT PROCEEDINGS TO PROTECT THESE CONSTITUTIONAL RIGHTS.

The Trial Court answered this Question in the affirmative.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1955

No. 12874

RUTH DEPRATTER, VERA MOBLEY, BILLIE TRAINA,
AUDREY MILLER, and JOE DIAZ,

Appellants,

v.

GUY FARMER, ABE MURDOCK, IVAR H. PETERSON, PHILIP
RAY RODGERS, and BOYD STEWART LEEDOM, individually
and as chairman and members of the National Labor
Relations Board,

Appellees.

Appeal from an Order of the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the District of Columbia dated June 28, 1955, in favor of the appellees dismissing appellants' Complaint and vacating the Temporary Restraining Order heretofore entered. The Court ruled that it was without jurisdiction of the subject matter of the action because appellants sought therein to review a representation proceeding arising under Section 9 of the National Labor Relations Act as amended, Act of July 5, 1935, c. 372, § 1, 49 Stat. 449, as amended June 23, 1947, c. 120, Title 29, § 101, 61 Stat. 136, U.S.C.A., Title 29, §§ 151,

et seq., and had failed to exhaust their administrative remedies. Jurisdiction of this Court to review the judgment is based upon the Act of June 25, 1948, c. 646, 62 Stat. 929,930, as amended October 31, 1951, c. 655, §§ 48, 49, 59(a), 65 Stat. 726, 727, U.S.C.A., Title 28, §§ 1291, 1292, 1294. Jurisdiction of the District Court was based on the fact that the matter in controversy exceeded the sum or value of \$3,000, the action arose under the Constitution, laws or treaties of the United States and was between citizens of different states, as is shown by appellants' Complaint (App. 2) as authorized by the Act of June 25, 1948, c. 646, 62 Stat. 930, U.S.C.A., Title 28, §§ 1331, 1332.

STATEMENT OF CASE

For the purposes of clarity and brevity, the National Labor Relations Act, as amended, will hereinafter sometimes be referred to as the "Act"; the National Labor Relations Board will hereinafter sometimes be referred to as the "Board"; the appellants' employer, Shoreline Enterprises of America, will hereinafter sometimes be referred to as the "Employer"; and the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.I.O., will hereinafter sometimes be referred to as the "Union".

This is a suit in equity, independent of the National Labor Relations Act as amended, *supra*, in which appellants, production employees of the Employer have brought suit against the individual members of the Board seeking to enjoin the certification by the Board of the Union as bargaining agent for the appellants and their fellow employees at Shoreline Enterprises of America (App. 13, 14). This election was held on April 4th and 5th, 1955, (App. 3), pursuant to a stipulation between the Employer and the Union. Four of the appellants were wrongfully prevented from voting in this election. Each would have cast a vote against the Union. (App. 8, 9). The other appellant cast a vote against the Union which was chal-

lenged and has not been counted (App. 6). The results of the election were fifty-five votes against the Union, fifty-eight votes for the Union, and one vote challenged. (App. 26). Therefore, appellants' votes would have changed the outcome of the election. (App. 9).

In said stipulation the Employer and the Union agreed that persons who did only clerical work or whose duties were confined solely to truck driving would not be included in the unit and defined the unit as "all production and maintenance employees, including refrigeration engineers, and excluding office employees and other clerical workers, professional employees, guards and/or watchmen and supervisors as defined in the Act." This unit includes all employees who worked a substantial portion of their time in production and maintenance. (App. 3, 4).

The representative of the Employer at this conference and the one signing the stipulation was the Company's attorney who was unfamiliar with the nature of the duties performed by the appellants DePratter, Mobley, Traina, and Diaz. The representative of the Employer was unaware that although appellant Diaz incidentally drove a truck for the Employer and appellants DePratter, Traina, and Mobley incidentally performed clerical work, the substantial portion of the services performed by each was in production and maintenance work. At the insistence of the Board agent that the names of all persons ineligible to vote be taken from the eligibility list, and upon the assurances of the Union representative and of the Board agent that the appellants DePratter, Mobley, Traina, and Diaz performed no other duties than those of truck driver and plant clericals, and were therefore ineligible to vote, these names were removed from the eligibility list. Actually, the appellants DePratter, Mobley, Traina, and Diaz were within the agreed unit and eligible to vote (App. 4).

Following the conference on March 21st, and just prior to the election, the Employer informed the appellants Diaz and Traina that they were ineligible to vote because they had been stricken from the eligibility list. On the first day of the election, the Employer informed the appellant DePratter that she was likewise ineligible to vote but requested that she serve as an election observer for the Employer. (App. 5). The appellant DePratter attended a pre-election conference on April 4th as an election observer, at which an officer of the Employer, the Employer's attorney, a second observer for the Employer, two Union observers, two representatives of the Union, and an agent of the National Labor Relations Board were present. The Board agent informed those present that he was going to conduct the election and that he was in complete charge thereof, and instructed the observers concerning their conduct and duties at the polls. He also informed the parties that the appellants DePratter, Mobley, Traina and Diaz were ineligible to vote and indicated by his statements that if the appellants tried to vote they would not be allowed to do so, but would be sent back to the plant. The representative of the Employer then left the conference, returned to the plant where the appellants were employed, and told the appellant Traina that the Board agent had said she could not vote. The appellant Mobley was not in the plant at the time and was therefore not informed that the Board agent had said she was ineligible to vote. (App. 6).

During the voting period, the appellant Miller went to the polls and cast a vote which was challenged by a Union observer. No investigation to determine her eligibility has been made by the Board (App. 6). Shortly thereafter, the appellant Mobley came to the polling place, before reporting to work, and was told by the Board agent that she was not eligible to vote and that if she insisted on casting a ballot, it would be challenged, thrown out and not counted. Therefore, the appellant Mobley left the polling place without voting and proceeded to her work

where she met and informed the appellant Traina of what had occurred. (App. 7). The appellant DePratter, at the polling place as an observer, also heard these statements of the Board agent. Appellants Traina and DePratter were thus advised that any attempt on their part to vote would be futile. (App. 7). The Board agent called the Union observers and told them that they could vote, but the appellant DePratter, who was present, was not told she could vote. (App. 7).

Appellants DePratter, Traina, Mobley and Diaz had never participated in an election of this nature and were not familiar with the procedure required by the Act. All relied on the belief that the Board agent had full knowledge of their eligibility to vote. By his statements and actions, and the statements and actions of the Employer, they were led to believe that they could not vote, that they would not be permitted to vote, and that any attempt on their part to vote would only result in embarrassment to them.

Had they been allowed to vote, these appellants would have voted against the Union and the Union would not have received a majority of the votes cast and would not have been selected as bargaining agent. (App. 5-8).

The appellants DePratter, Mobley, Traina, and Diaz objected to the conduct of the election in a letter to the Regional Director of the Tenth Region of the National Labor Relations Board in Atlanta, Georgia, in which they asserted that they were eligible to vote and had been unlawfully denied their right to vote. (App. 27, 28) The Regional Director's answer was that the appellants DePratter, Traina, and Diaz had not been denied their right to vote because they had not presented themselves at the polls and that the appellant Mobley had not been denied the right to vote because she had chosen to leave the polls without casting a challenged ballot. The Regional Director concluded that under the circumstances, the matter must be considered closed. (App. 29)

The Employer filed objections to the election based in part upon the denial of the appellants' right to vote. The Board then conducted an investigation but made no inquiry to determine the nature of the duties performed by the appellants. Again the appellants protested to the Regional Director of the Tenth Region. The Regional Director's answer merely referred appellants to the investigation then being conducted by the Board (App. 11).

On June 1, 1955, the appellants filed their verified Complaint in the District Court for the District of Columbia (App. 2), alleging the foregoing facts and the fact that, although there are certification proceedings now pending before the Board, resulting from the Employer filing Exceptions to the Regional Director's Report on the election, the appellants are not considered parties to those proceedings and have no standing before the Board. (App. 10, 11). The Complaint also alleged that the appellees by the aforesaid illegal and arbitrary action in regard to appellants Mobley, DePratter, Traina and Diaz, did thereby deprive these four appellants of their right to participate in an election held for the purpose of selecting or rejecting a bargaining agent, without any judicial, legislative or administrative determination and therefore without due process of law and in violation of the Constitution of the United States as well as the Labor Relations Act.

By thus depriving the appellants Diaz, DePratter, Traina, and Mobley of their right to participate in the election, the appellees altered the outcome of the election and thus violated the Constitutional rights of appellant Miller and of all other employees who voted "no" in the election. Appellant Miller and the other employees who voted "no" in the election, were thereby reduced from a majority to a minority by the illegal and arbitrary action of the appellees in preventing the appellants DePratter, Mobley, Traina, and Diaz from voting. This action by

the appellees therefore resulted in the selection and designation of an exclusive bargaining agent that would not have otherwise been selected or designated and by a minority of the employees voting and who would have voted except for the aforesaid illegal and arbitrary action by the appellees rather than by a majority as required by law and by the Constitution of the United States. The appellants were therefore deprived of their liberty and property rights and their freedom to bargain with respect to rates of pay, wages, hours of employment and other conditions of employment without the intervention of the Brewery Workers Union as bargaining agent. Upon certification of the Union the appellants will be required to work under a contract which is contrary to their desires, all without due process of law as guaranteed by the Fifth Amendment of the United States Constitution and in contravention of the requirements and intent of the Labor Management Relations Act, 1947 as amended. (App. 11). The appellees as members of the Board, or a majority of them, will certify that the Union was designated by a majority of the employees in the bargaining unit, even though said Union was not selected by a majority, but by a minority of the employees who voted and would have voted except for the aforesaid arbitrary and illegal action of the appellees and the Board will certify said Union as the exclusive bargaining agent for the appellants and their fellow employees in respect to rates of pay, hours of employment, wages, and other conditions of employment. Appellees will thereby cause appellants to suffer this and other irreparable damage and appellants are without remedy, administrative or otherwise, and are without redress for the protection of their rights as aforesaid, save in a court of equity. (App. 12, 13).

The Complaint further alleged that because appellants were not allowed to vote in the representation election, the Union did not receive the majority of votes required by the National Labor Relations Act and the only process provided by law by which an employee can be forced to

accept a bargaining agent against his wishes. (App. 11, 12). This unconstitutional deprivation of appellants' rights was asserted as the basis upon which the Court had jurisdiction to grant the relief in question. (App. 3).

On June 1, 1955, upon Motion of appellants, Judge Curran granted a Temporary Restraining Order without Notice, restraining and enjoining the Board from certifying the Union as the representative of the appellants and their fellow employees in the alleged bargaining unit at Shoreline Enterprises of America. Appellants filed their Complaint and a Motion for Preliminary Injunction. (Tr. 36).

On June 8, 1955, the appellees filed their Motion to Dismiss or in the alternative for Summary Judgment. (Tr. 43). In support of their Motion for Summary Judgment, the appellees attached an affidavit of Frank M. Kleiler, Executive Secretary of the National Labor Relations Board, to which was annexed, as Exhibit A, the Report on Election, Objections to Election, and Recommendations to the Board made by the Regional Director of the Tenth Region as a result of the investigation conducted by him upon the Employer's Objections to the Election. The Kleiler affidavit stated in substance that the Union had filed a petition pursuant to Section 9 of the Act; that pursuant to Section 9(c) the Board's Regional Director on February 14, 1955, had issued a Notice of Hearing; and that a hearing was held before a hearing officer on March 3, 1955, prior to the conference of March 21, 1955, at which the bargaining unit was agreed upon. The Kleiler affidavit also referred to the fact that the Regional Director had filed his Report on the Employer's Objections to the Election; that four of the appellants had filed a Motion to Intervene and Exceptions to that portion of the Regional Director's Report concerning the wrongful denial of their right to vote in the election; and that the Employer had filed his Exceptions to this Report. (App. 37 & 39).

The Regional Director's Report, Exhibit A, attached to the Kleiler affidavit, stated that during the course of this hearing, testimony was taken as to whether any employees performed work as truck drivers or as plant clericals. (App. 51). Although the Employer took the position that truck drivers and plant clericals, among other classifications, were not within the unit designated in the petition, the hearing officer made no inquiry as to whether workers who performed such duties of this nature did so incidentally to work in production and maintenance. Since the Union's requested unit in the petition which was considered at the hearing was entirely different from the unit finally agreed upon at the conference of March 21, 1955, the question of particular duties at the time of the hearing was immaterial. The Employer took no position as to whether any particular employees fell within the category which the Employer contended was excluded (App. 51). Although the Regional Director concluded that the appellants were within the bargaining unit set out in the written stipulation agreed to at the conference of March 21, 1955, as alleged in the Complaint, and that there were issues of fact as to whether at least some of the appellants were wrongfully deprived of the opportunity to vote, he recommended that the Employer's Objections be overruled. This recommendation was based upon the Regional Director's conclusion that appellants were ineligible to vote because there must have been an oral agreement defining a bargaining unit which excluded the appellants, DePratter, Mobley, Traina, and Diaz, as a class of part-time production workers, the existence of which is denied by the Complaint. (App. 59-62 & 62-63).

The hearing upon appellants' Motion for Preliminary Injunction and appellees' Motion to Dismiss or in the alternative for Summary Judgment was held on June 14, 1955. Prior to this hearing the appellants filed affidavits in opposition to appellees' Motion to Dismiss and in sup-

port of appellants' Complaint and Motion for Preliminary Injunction (Tr. 67-97). The affidavit of Billy D. Hice contained the affirmative statement that there was no oral agreement as found by the Regional Director. (App. 63). At the hearing both parties presented oral arguments and submitted briefs to the Court for consideration. On June 28, 1955, the Honorable Burnita Shelton Matthews, District Judge, entered an Order granting appellees' Motion to Dismiss, dismissing appellants' Complaint and vacating the Temporary Restraining Order previously entered. The Trial Court concluded that this was an action to review a representation proceeding under Section 9 of the National Labor Relations Act, *supra*, and the Court was thus without jurisdiction of the subject matter of the action, and that appellants had failed to exhaust their administrative remedies. (App. 66-67).

On July 28, 1955, the appellants filed their Notice of Appeal to the Court of Appeals for the District of Columbia from the Order granting appellees' Motion to Dismiss, dismissing the Complaint, and vacating the Temporary Restraining Order. (Tr. 100).

STATEMENT OF POINTS

The points upon which appellants will rely on appeal are:

1. The Court erred in holding that the Court was without jurisdiction to entertain the action.
2. The Court erred in holding that the appellants had failed to exhaust their administrative remedies.
3. The Court erred in granting the appellees' Motion to Dismiss the Complaint.
4. The Court erred in dismissing the appellants' Complaint.
5. The Court erred in refusing to grant appellants' Application for a Preliminary Injunction.

SUMMARY OF ARGUMENT

Question I.

A. *The election deprived appellants of their constitutional rights without due process of law.*

Four of the appellants were wrongfully denied the right to participate in the election. These appellants were eligible to vote and were within the unit designated in the written stipulation agreed to by the Employer and the Union.

The Report of the Regional Director of the National Labor Relations Board recommended that the appellants DePratter, Mobley, Traina and Diaz, be found ineligible to vote on the basis that they were excluded from the unit because there must have been an oral agreement entered into contemporaneously with the written agreement, defining a bargaining unit which excluded these appellants as a class of part-time production workers. However, these four appellants were not part-time employees, they were dual employees. Three of the four appellants spend the majority of their working time within the unit and could not possibly be considered part-time production workers, but at most could be considered part-time clericals. The appellants were unable to find any case in which the Board permitted such an exclusion.

Even if the Court should feel that the question of whether or not such an exclusion should be permitted, is a question requiring the experience of the Board, the fact is that no such agreement as alleged by the Regional Director was entered into. It is therefore seen that at best the existence or non-existence of this alleged agreement on which the exclusion of four of the appellants is based is a question of fact which must await the trial of the issues. The Complaint denies the existence of such agreement and an affidavit in support of the Complaint likewise denies its existence. On a Motion to Dismiss the allegations of

the Complaint must be taken as true and the alleged oral agreement must be disregarded. Even if we assumed *arguendo* that there was such an agreement, it could not be considered because the oral agreement contradicts the written agreement entered into at the time of the alleged oral agreement, in violation of the parol evidence rule.

The fact is that the Regional Director's report is not properly before this Court. On a Motion to Dismiss the Court may consider only the facts set forth in the Complaint, and an affidavit filed in support of the motion may not be considered as proof contradictory to well-pleaded facts in the Complaint. However, the Court may consider and weigh such affidavits for the purpose of hearing and determining the question of jurisdiction. If, however, the jurisdiction of the Court depends upon the merits of the appellants' claim, as is the case here, the Court may not consider the affidavits, especially if the claim arises under the Constitution of the United States and is not transparently frivolous.

The Report is not an affidavit, but a compilation of conclusions, arguments on the conclusions, and credibility findings. The Report was not filed in support of the Motion to Dismiss, but rather in support of the Motion for Summary Judgment which was not ruled on by the Court below. Accordingly, the Report should not be considered by this Court in determining whether the District Court erred in granting appellees' Motion to Dismiss.

These appellants were eligible to vote. Since the appellees illegally and unlawfully prevented them from voting, the election in this case was illegal and not in accordance with due process. Appellant Miller and the other employees who voted "no" in the election were thereby reduced from a majority to a minority by the illegal and arbitrary action of appellees in preventing the appellants DePratter, Traina, Mobley and Diaz from voting.

B. The Complaint asserts the loss of a substantial constitutional right.

Since the outcome of the election would have been changed by the votes of appellants DePratter, Mobley, Traina and Diaz (the results of the election were fifty-eight votes for, fifty-five votes against the Brewery Workers Union, and one vote challenged; if these four appellants had been permitted to vote the results would have been fifty-eight votes for, sixty votes against the Brewery Workers Union—the Brewery Workers Union thereby losing the election), the illegal and arbitrary action of the appellees resulted in the selection of a bargaining agent contrary to the desires of the majority of employees participating in the election and who would have participated but for the illegal and arbitrary action of the appellees. Accordingly, the appellants were deprived, without due process of law, of their constitutionally-protected right to bargain individually with their employer or to select a more appropriate bargaining agent.

Any exclusion of the appellants DePratter, Mobley, Traina and Diaz is illegal. Although the exclusion is illegal, the question might be asked as to how any loss could result to the appellants if these four appellants were excluded from the unit to be represented by the Brewery Workers Union, since they would technically remain free to bargain individually with their employer and would not be bound by the contract entered into between the Employer and the Union. However, such a contention is only theoretically true, since DePratter, Mobley and Traina would still be within the unit a majority of their working time and would, in fact, work under the conditions set by the Brewery Workers Union. Such a contention also fails to take into consideration the infringement of the constitutional rights of appellant Miller and the other employees who voted not to be represented by the Brewery Workers Union. By unlawfully and illegally excluding appellants DePratter, Mobley, Traina and Diaz

from the unit and thereby illegally preventing them from participating in the election, appellant Miller and the other employees who voted not to be represented by the Brewery Workers Union were reduced from a majority to a minority and thereby deprived of their constitutionally-protected rights and the rights provided by the National Labor Relations Act without due process of law.

The guarantee provided by the Constitution for the protection of the right to contract, as a property right, is not provided in express terms; but the protection exists as a necessary inference from the guarantee of general property rights. The privilege of pursuing an ordinary calling or trade and of acquiring, holding or disposing of property also includes the right to make contracts in relationship with others.

Question II.

The jurisdiction of the District Court conferred by Act of June 25, 1948, c. 646, 62 Stat. 930; U.S.C.A., Title 28, §§ 1331, 1332, is manifestly broad enough to encompass the subject matter of this type of controversy unless limited by some particular statute, such as Section 10 of the National Labor Relations Act, Act of June 7, 1934, c. 426, 48 Stat. 926; July 5, 1935, c. 372, § 10, 49 Stat. 453; June 25, 1936, c. 804, 49 Stat. 1921; as amended June 23, 1947, c. 120, Title 1, § 101, 61 Stat. 146; June 25, 1948, c. 648, § 32, 62 Stat. 991, eff. Sept. 1, 1948; U.S.C.A., Title 29, § 160.

The only method of appeal provided by the Act, is an appeal to a Court of Appeals from a final order of the Board in an unfair-labor-practice proceeding. A certification or representation proceeding is not directly reviewable since it is not considered a final order of the Board. However, indirect review of the certification proceedings may be obtained by an Employer. The Employer upon certification of the Union by the Board could refuse to bargain. The Union would then be obliged to institute

unfair-labor-practice proceedings for the refusal to bargain. The order arising from this proceeding would be reviewable and the certification proceedings would be part of the record to be reviewed. Although this review proceeding is available to an employer, it is not available to these employees. There is no method by which these employees may obtain a review of the arbitrary and illegal action of the appellees save in a Court of Equity.

It might be argued that when a right is created out of the provisions of the Act, those rights should be resolved and determined by the provisions of the Act. However, that is not the case here. The rights of the appellants which have been infringed were not created by the Act but are rights protected by the Constitution. These constitutionally-protected rights, not arising from the Act, cannot be limited, resolved or determined by that Act without a right of review. Since the Act provides no method of review, the Equity Courts must afford the review. The Equity Courts must protect the constitutional rights of these appellants from destruction without due process of law.

Although the Supreme Court of the United States has reserved judgment on the type of action instituted by these appellants, the lower Courts have recognized that the District Court has jurisdiction to review a representation proceeding if a constitutional right is asserted which is not transparently frivolous, and that, having once acquired jurisdiction, the Court should dispose of all other questions which arise, even though they would not have been independently justiciable.

Question III.

The appellants have no administrative remedy and therefore their suit cannot be premature. Although the appellants attempted to become parties to the administrative proceeding by filing objections to the election

based upon the denial of the right to vote to certain of the appellants, they were not permitted to do so.

The appellants, being individual employees of the Employer, are not considered parties in a representation proceeding and are not permitted to take part therein. Although it must be admitted that the Board has the power to permit these appellants to intervene, it is not a matter of right, but rather one resting in the discretion of the Board which it is free to exercise or withhold as it desires. However, one is not considered as having an administrative remedy when the right to exercise that remedy rests in the discretion of an administrative body.

Since these appellants have no administrative remedy, there is none which they could exhaust before instituting the present action.

In the present case, there is nothing these appellants could have done which would have prevented the certification of the Union as their bargaining agent. Here, a third party, the Employer, one of the parties to the administrative proceeding, has availed itself of its administrative remedy (which is unavailable to the appellants) by taking an administrative appeal which seeks to accomplish approximately the same results as the appellants are seeking to accomplish by this suit. However, the Employer does not represent appellants. Its interests are different from those of appellants. The Employer's cause of action and merits are different from the cause of action and merits of appellants' case. Appellants have no way whatever of having their interests represented or protected in the administrative proceedings. The fact that the Board might determine that the Employer's rights had not been invaded does not determine whether or not the appellants' rights have been invaded. Should the administrative proceedings result in a finding against the Employer, the Employer will be required immediately to bargain exclusively with the Union. At this point the irreparable damage to these appellants will have been

done and they will have been deprived of their constitutional rights, which are now in a state of suspension, without ever having had available to them any remedy, administrative or judicial. Appellants cannot thus be required to have their constitutional rights hang on the thin thread of the merits of another's cause of action.

ARGUMENT

I.

THE FIRST QUESTION CONCERNS DUE PROCESS AND CONSTITUTIONAL RIGHTS, AND DUE TO COMPLEXITY WILL BE PRESENTED AS THREE QUESTIONS, WHICH WILL BE ARGUED TOGETHER.

A. The Question is Whether the Appellants' (Individual Employees) Right to Bargain With Their Employer or to Select an Agent to Bargain for Them in Relation to Matters of Wages, Hours and Working Conditions Are Liberties and Property Rights Protected by the Constitution of the United States.

The District Court answered this Question in the negative.

B. The Question is Whether the Appellants Were Denied Due Process of Law by the Action of Appellees in Unlawfully and Wrongfully Denying Certain of the Appellants, Who Were Eligible to Vote, the Right to Vote in an Election Provided by the National Labor Relations Act, as Amended, for the Purpose of Selecting or Rejecting a Bargaining Agent.

The District Court answered this Question in the negative.

C. The Question is Whether This Denial of Due Process Deprived the Appellants of Their Constitutional Rights Because the Votes of Those Certain Appellants, Unlawfully Prevented From Voting, Would Have Changed the Outcome of the Election in

Which a Bargaining Agent Was Selected, Which Agent Would Not Have Been Selected Had These Appellants Been Permitted to Vote.

The District Court answered this Question in the negative.

A. *The election deprived appellants of their constitutional rights without due process of law.*

The appellants were wrongfully denied the right to participate in this election. All of them worked regularly and for a substantial period of time within the unit. The details of this fact are fully set forth in their individual affidavits which are a part of the Transcript in this case. (Tr. 67-85) The appellees do not deny that the appellants work a substantial amount of time within the unit.

In *Ocala Star Banner* 97 NLRB 384 (1951), the Board held that employees working at two or more jobs for the same employer are eligible to vote if the employees' work within the unit is regular and for substantial periods of time. In *The Broderick Company* 99 NLRB 385 (1952) the Board held that twenty percent of the employees' time spent working within the unit was a substantial amount of time, and that therefore the employees were eligible to vote.

The appellants in the instant case are all employees who work a substantial amount of time within the unit and on the authority of the above decisions were entitled to vote in the NLRB election. *Courtland Mfg. Co.* 95 NLRB 1292 (1951); *Glidden Co.* 74 NLRB 1257 (1947).

The Regional Director, however, recommended that the Board find that the appellants DePratter, Mobley, Traina and Diaz were excluded from the unit agreed to by the Employer and the Union and were therefore ineligible to vote in the election. He arrived at this recommendation even though he had concluded that DePratter, Mobley,

Traina and Diaz were within the unit agreed to by the Union and the Employer as set out in the written stipulation for consent election. The recommendation excluding DePratter, Mobley, Traina and Diaz from the unit was based on the Regional Director's conclusion that there must have been an oral agreement defining a bargaining unit which excluded the appellants DePratter, Mobley, Traina and Diaz as a class of part-time production workers in addition to the written agreement set out in the stipulation.

However, even if we assume, *arguendo*, that the Employer and the Union could by stipulation eliminate the part-time employees, the appellants, DePratter, Mobley, Traina and Diaz were *NOT* part-time employees, they were *dual* employees. They work full time (as opposed to part-time) for their Employer, and only a minor part of their time is outside of the unit.

In addition, the appellants Ruth DePratter, Vera Mobley and Billie Traina could not be considered part-time production workers since they spend the majority of their time in production work rather than in clerical work. The appellants are not aware of any case in which the Board has permitted the parties to exclude dual employees where, as here, the majority of their time was spent in production work. Not only is the case *Bachman Uxbridge Worsted Corporation*, 109 NLRB No. 135 (1954) cited by the Regional Director as authority to eliminate DePratter, Mobley, Diaz and Traina from the unit, concerned only with part-time employees (that is, those not customarily employed full time) and not dual employees, as in the case at bar, but in that instance the part-time employees permitted to be excluded were those who worked less than the majority of their working time for the Employer.

However, even if we were to assume the Board had the power to exclude dual employees upon agreement by the Union and the Employer, or if this Court should feel that

the question was one deserving the experience of the Board in this instance, the fact remains that *THERE WAS NO SUCH AGREEMENT*, and no one contends there was although assumed by the Regional Director.

The unit agreed to and set out in the written stipulation for consent election was "all production and maintenance employees, including refrigeration engineers, excluding truck drivers and excluding all office employees and all clerical employees, professional employees, guards and/or watchmen and supervisors as defined in the Act." This unit includes all employees who work a substantial portion of their time in production jobs, regardless of their other duties.

There is no reference made in the written agreement about excluding part-time or dual employees. There were also other employees who were in fact part-time employees and there were also other dual employees who were permitted to vote. Yet, only the appellants DePratter, Mobley, Traina and Diaz were removed from the eligibility list. (The removal of employees from the payroll list is the usual procedure when the Board and the parties believe they are excluded from the agreed unit and could not be considered an enlargement of the unit.) The removal of DePratter, Traina, Mobley and Diaz from the eligibility list substantiates their position that they were so removed on the mistaken belief that their duties were solely that of plant clerical and truck driver, rather than on the basis that they were excluded as part-time employees. Further substantiation of this is derived from the fact that other employees who were dual employees and those employees who were part-time employees were not stricken from the eligibility list. It is well recognized that the Board does not eliminate individual employees within a category, but instead eliminates the entire category. Some employees within a category cannot be permitted to vote and others in the same category denied the right to vote.

There is other evidence which the appellants could introduce to show that there was no such agreement to eliminate DePratter, Mobley, Traina, and Diaz, including direct testimony of the Employer's representative at the conference in which the written stipulation setting out the unit was agreed to. It, therefore, is seen that at best the existence or non-existence of the agreement on which the exclusion of DePratter, Mobley, Traina and Diaz would be based is a question of fact. The proof of the existence or non-existence of the agreement should be made at the trial of the issues and cannot be disposed of upon a Motion to Dismiss. This is merely a question of fact which can be decided by the Court as well as the Board since it requires no expert knowledge. The verified Complaint denies the existence of such an agreement and the affidavit of Billy D. Hice filed in support of the Complaint also denies the existence of the alleged agreement.

Even if we were to assume, *arguendo*, that there was such an agreement to exclude part-time or dual employees it had to be an oral agreement. However, the Court will recognize that the parol evidence rule is applicable here, which is not only a rule of evidence but of substantive law as well. 20 *Am. Jur.* 958, *Evidence* § 1099; *Northern Assur. Co. v. Grand View Bldg. Assoc.*, 183 U.S. 308, 22 S. Ct. 133 (1902); 20 *Am. Jur.* 963, *Evidence* § 1100.

In addition, the Regional Director's conclusion that there was such an agreement is based purely on speculation and not upon any direct testimony. Therefore, this is a conclusion of the Regional Director. For the purposes of this argument on the Motion to Dismiss, the fact that there was *NO* such agreement must be taken as true. Accordingly, the appellants' were entitled to vote in the election.

The appellees have managed to raise this question concerning the existence or non-existence of this alleged

agreement only by virtue of the Regional Director's report. This report is improperly before this Court.

When the "Motion of Defendants to Dismiss the Complaint, Or in the Alternative for Summary Judgment in their Favor" was filed by the appellees, they attached, in support of the Motion for Summary Judgment, the affidavit of Frank M. Kleiler to which was annexed Exhibit A, consisting of the Regional Director's Report on Election, Objections to Election and Recommendations to the Board.

This Report should not have been considered by the Court below in granting appellees' Motion to Dismiss and, there being nothing in the record to indicate that it was considered, we shall assume that the lower Court properly withheld this Report from its consideration. However, whether the lower Court erroneously considered the Report or properly refused to do so, this Report attached to appellees' Motion for Summary Judgment, which was not ruled upon, should not be considered by this Court for any purpose.

Out of an overabundance of caution and in order to have the full record before the Court below before this Court, the appellants designated the appellees' Motion for Summary Judgment and the attached affidavit and exhibit in its Designation of Record.

Since the Court below did not rule on the Motion for Summary Judgment or the attached affidavit and exhibit, it is actually not before this Honorable Court. The present inclusion of this Motion and attached affidavit and exhibit in the joint appendix is by designation of the appellees.

On a Motion to Dismiss the Court may consider only the facts set forth in the Complaint. *Farrall v. District of Columbia Amateur Athletic Union*, 80 App.D.C. 396, 152 F.2d 647 (C.A.D.C.—1946); *Brandenburg v. Brandenburg*, 80 F.Supp. 562 (D.C.D.C.—1942). An affidavit filed

not proceed to decide the other issues involved. * * *"
(Emphasis ours)

A review of the cases of the District of Columbia shows that this Honorable Court has recognized its jurisdiction of the particular type of case presented here. This Court recognizes the right of an injured party to obtain a review of a representation proceeding when a constitutional right has been invaded. *American Federation of Labor v. National Labor Relations Board*, 70 App.D.C. 62, 103 F.2d 933 (C.A.D.C.-1939); *American Federation of Labor v. Madden*, 33 F.Supp. 943 (D.C.D.C.-1940); *Reilly v. Millis*, 50 F. Supp. 172, (D.C.D.C.-1943), 79 App.D.C. 171, 144 F.2d 259 (C.A.D.C.), certiorari denied 325 U.S. 879, 65 S.Ct. 1566 (1945); *White v. Herzog*, 80 F.Supp. 407 (D.C. D.C.-1948); *International Printing Pressmen v. Herzog*, (Unreported) April 28, 1952, Civ. No. 1251-1252 (D.C.D.C.).

The right of the plaintiffs to appeal to this Court for relief upon violation of their constitutional rights through the National Labor Relation Board's failure to comply with the provisions of the Act is likewise recognized in the following cases:

Fitzgerald v. Douds, 167 F.2d 714 (2nd Cir.-1948); *New Bedford Loomfixers' Union v. Alpert*, 110 F.Supp. 723 (D.C.Mass.-1953); *Housewright, et al v. Hull*, 104 F. Supp. 234 (D.C.Ohio-1952); *Mechanics Educational Society of America, et al. v. Schaufler*, 103 F.Supp. 130 (D.C.Pa.-1952); *White v. Douds*, 80 F.Supp. 402 (D.C. N.Y.-1948); *R. J. Reynolds Employers Association, Inc. v. National Labor Relations Board*, 61 F.Supp. 280 (D.C. N.C.-1943); *Wilson Employees Representation Plan v. Wilson and Co.*, 53 F.Supp. 23 (D.C.Calif.-1943); *International Brotherhood of Electrical Workers v. National Labor Relations Board*, 41 F.Supp. 57 (D.C.Mich.-1940); *Electrical Workers, et al.*, (Unreported) Case No. 600 (N.D.Tex.-1951); cf: *Brotherhood and Union of Transit Employees of Baltimore v. Madden*, 147 F.2d 439 (4th

Board decision. Accordingly, the Supreme Court could have done likewise and reserved its decision on the reviewability question until the facts showed an infringement of rights by the National Mediation Board. (For further limitation on the effect of *Switchmen's* case, see *Airline Dispatchers Association v. National Mediation Board*, 89 App.D.C. 24, 189 F.2d 685 (C.A.D.C.-1951); certiorari denied 342 U.S. 849, 72 S.Ct. 77 (1951)).

The appellants submit that the following decision is presently the leading case on this question. The United States Court of Appeals for the Second Circuit, in 1949, in *Fay v. Douds*, 172 F.2d 720 (2nd Cir.-1949), speaking through Honorable Chief Justice Learned Hand, in an appeal from a judgment of the District Court in which a local union sought an injunction and in which case the injunction was denied, states:

"The first question is as to the jurisdiction of the District Court which the defendant disputes, invoking our decision in *Fitzgerald v. Douds*. We there held that, since the only review of a certification proceeding under Section 9 was an incident to a petition to review an order of the Board under Section 10, the remedy so created was exclusive; although we recognized that the result might be otherwise, if a constitutional question were raised. The plaintiff at bar does raise such a question; he asserts that the Local has a 'property' right in the maintenance of its position as exclusive bargaining agent, and that this was substantially invaded by denying its privilege of a hearing upon the 'investigation' preparatory to deciding whether an election should be called. *If this assertion of constitutional right is not transparently frivolous, it gives the District Court jurisdiction;* and, having once acquired jurisdiction, the Court might, and should, dispose of all other questions which arose, even though they would not have been independently justiciable. Although, as will appear, we do not think that the Local was denied any constitutional right, we do think that its contention is not so plainly untenable that the District Court might

propriate hearing' which § 9(c) requires and that the effect was not only to deprive them of the statutory right to hearing but also to deny them due process of law contrary to the Fifth Amendment's guaranty. Accordingly, they seek, in substance, injunctive relief requiring respondents, members of the Board, to vacate the order of certification or, in the alternative, a declaratory judgment that the order is invalid.

"The District Court declined to dismiss the suit, upon respondents' motion alleging, among other grounds, that the court was without jurisdiction of the subject matter. The Court of Appeals reversed the judgment, one judge dissenting. App.D.C., 144 F.2d 539. That court held that the statutory review is exclusive, with the consequence that this suit cannot be maintained. The obvious importance of the decision caused us to grant the petition for certiorari. 323 U.S. 703, 65 S.Ct. 269."

The Court then discussed the *American Federation of Labor v. National Labor Relations Board* case, hereinbefore discussed, and stated at page 1318:

"Petitioners earnestly urge that this case presents the required showing of unlawful action by the Board and resulting injury. Unless they are right in this view, it would be inappropriate, as was said in the *American Federation of Labor* case, to determine the question of reviewability. That question should not be decided in the absence of some showing that the Board has acted unlawfully. Upon the facts presented, we think no such showing has been made, whether by way of departure from statutory requirements or from those of due process of law."

It is therefore seen that the Supreme Court did not apply its decision in the *Switchmen's* case to cases arising under the National Labor Relations Act. If it had so intended, there would have been no necessity to inquire into the facts as it did. The Court could simply have affirmed on the authority of the *Switchmen's* case.

This Court will also note that in the *Switchmen's* case the lower Courts had affirmed the National Mediation

is recognized, and as a species of property which no law can restrict, save in those socialistic states where individual rights and liberties are unknown. If all of this be true, as I had thought was universally recognized, then—representation—the right to combine one's faculties with those of others and to profit by the combination—is just as incontestable and inexpressible."

This decision by the Court of Appeals was carried to the Supreme Court on certiorari, *Inland Empire District Council, Lumber and Sawmill Workers Union, et al. v. Millis, et al.*, 325 U.S. 697, 65 S.Ct. 1316 (1945). Although the Circuit Court had not inquired into the facts to determine whether the Court had jurisdiction or not, but simply relied on the authority of the *Switchmen's* case to dismiss the complaint, the Supreme Court looked into the facts. The Supreme Court affirmed the decision of the Court of Appeals, but it did not affirm on the basis of the *Switchmen's* case, i.e., that the District Court lacked jurisdiction. Instead the Supreme Court found that there was no question of an invasion of constitutional rights or failure to follow the procedures outlined by the Act in this case. The Supreme Court, through Mr. Justice Rutledge, stated at page 1317:

"In *American Federation of Labor v. National Labor Relations Board*, 308 U.S. 401, 60 S.Ct. 300, 84 L.Ed. 347, this Court held that a certification under § 9(c) is not reviewable by the special statutory procedure except incidentally to review of orders restraining unfair labor practices under § 10, 29 U.S.C.A. § 160. Decision was expressly reserved whether, apart from such proceedings, review of certification may be had by an independent suit brought pursuant to § 24 of the Judicial Code, 28 U.S.C.A. § 41. 308 U.S. 412, 60 S.Ct. 305, 84 L.Ed. 347.

"Petitioners now assert the right to such review. Prior to the certification, they had represented the company's employees in collective bargaining. They do not seek review upon the merits of the certification. Their claim is that they were denied the 'ap-

Edgerton rendered the majority decision in which the Court found that the District Court was in error for refusing to dismiss the complaint. The majority said:

"The National Labor Relations Act authorizes judicial review of the Board's certification if, but only if, the Board finds unfair labor practices and makes its certification the basis of an order with respect to such practices. * * * There is no such finding or order in this case. We think the statutory remedy is exclusive. In *American Federation of Labor v. National Labor Relations Board*, * * *, the Supreme Court expressly reserved the question whether the Board's mere certification of collective bargaining representatives could be reviewed in a suit like the present one. But we think the question is now foreclosed by *Switchmen's Union of North America v. National Mediation Board*, * * *, which held that the District Court had no power to review a similar certification of the National Mediation Board."

The words of Chief Justice Groner in dissenting should be noted:

"* * * Here, as I have pointed out, appellees claim irreparable injury and a lack of due process as a consequence of the certification without a hearing. What support there is of this in the facts I have no means of knowing, but I think it is not an answer to the contention to say that Congress has denied to the Courts of the country the right to examine and determine the validity of the charge; or, indeed, that Congress, constitutionally may do so. It is quite true that in cases under the Railway Labor Act, the Court speaks of the 'rights' of an employee to choose his representative as a right created by Congress, and, therefore, as a right which Congress having given, Congress may take away; and it may be that the same answer is applicable here, but I prefer that it should be declared by the Supreme Court rather than by this Court. For I had always thought that the right of a man to labor and to enjoy the fruits of his labor was an inherent right—a natural prerogative—which did not arise out of the concession of any state. I had considered it the foundation of all rights where liberty

Accordingly, a decision by this Honorable Court was rendered in *Millis, et al. v. Inland Empire District Council, Lumber and Sawmill Workers Union, et al.*, 79 App. D.C. 214, 144 F. 2d 539 (C.A.D.C.-1944), which followed the *Switchmen's* case and applied it to the National Labor Relations Act. In that case the plaintiff union brought an action against Millis individually and as chairman and member of the National Labor Relations Board and others for a mandatory injunction requiring the defendants to set aside a certification following an election and for declaratory judgment that the certification was void. In this case the plaintiff union had represented the employer's employees at five separate plants. The C.I.O. union petitioned the Board for an election in each one of the five separate plants. The Board denied the petition on the basis that separate plant-wide units were inappropriate. The C.I.O. filed a new petition asking for an election in a unit composed of the employees in all five plants. There had been a hearing after the first petition was filed, but there was no hearing held on the second petition because the Board treated the new petition by the C.I.O. as an amendment to the original petition. An election was ordered and the C.I.O. received a majority of those voting. The Board certified the C.I.O. union as bargaining representative. The plaintiff union complained that the election should not have been ordered without a hearing because the amendment introduced new and substantially different and inconsistent issues from those involved in the hearing held on the first petition. There were other grounds alleged which tended to show capricious and arbitrary action on the part of the Board in the exclusion of certain classes of employees from the right to vote.

The District Court declined to dismiss the complaint on defendant's motion. The defendant appealed to the Court of Appeals. The case was before Groner, Chief Justice, and Miller and Edgerton, Associate Justices. Justice

election cancelled and brought suit in the District Court for this purpose.

The District Court reviewed and upheld the decision of the Mediation Board. The Court of Appeals affirmed on appeal. The Supreme Court granted certiorari and reversed, saying in part:

"We do not reach the merits of the controversy. For we are of the opinion that the district court did not have the power to review the action of the National Mediation Board in issuing the certificate.

* * *

"* * * A review by the federal district courts of the Board's determination is not necessary to preserve or protect that 'right'. (Ed. note: The Court refers to the right of the majority of any craft or class to determine who shall be the representative of the craft or class for the purposes of the Railway Labor Act.) Congress for reason of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question. All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced."

Several differences between the case at bar and this decision are quickly discernible. Probably the most notable is the fact that the Railway Labor Act was involved in the *Switchmen's* case while the National Labor Relations Act is involved in the present case. Another basic difference is the composition of the two acts in regard to representation proceedings.

However, this case was taken by many judges and text writers to mean that judicial review of certification proceedings was foreclosed, not only under the Railway Labor Act, but also under the National Labor Relations Act.

tional Bituminous Coal Commission, 306 U.S. 56, 59 S.Ct. 409, 83 L.E. 483; cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.E. 638. But that question is not presented for decision by the record before us. Its answer involves a determination whether the Wagner Act, in so far as it has given legally enforceable rights, has deprived the district courts of some portion of their original jurisdiction conferred by § 24 of the Judicial Code, 28 U.S.C.A. § 41. It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy. This question can be properly and adequately considered only when it is brought to us for review upon a suitable record."

Another decision of the Supreme Court which, although it is not in point, might, at first glance, appear to be so, is *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297, 64 S.Ct. 95 (1943). In that case the plaintiffs were members and officials of the Switchmen's Union and employees of the involved carrier. A certification of representatives for collective bargaining under the Railway Labor Act was made by the National Mediation Board. This certification followed the invocation of the services of the Board to investigate a dispute among the yardmen as to their representatives. One union sought to represent all the yardmen of the rail lines operated by the New York Central System. The plaintiff union contended that yardmen of certain designated portions of the rail lines should be permitted to vote for separate representatives instead of the rail line wide unit.

The Board held that all yardmen of the carrier should be the proper unit for the election. The election was held and the other union won. After the results were certified to the carriers, the plaintiff union sought to have the Board's determination as to the unit for the

the general equity powers of the court cannot be invoked, at least *where the steps taken by the Board under Section 9 do not substantially affect the constitutional rights of the parties.*" (Our emphasis)

The problem presented by this case was first considered by the United States Supreme Court in *American Federation of Labor v. National Labor Relations Board*, 308 U.S. 401, 60 S.Ct. 300 (1940). In this case, the A. F. of L. had been the representative of longshoremen on the west coast. An election was held and the C.I.O. was certified by the Board. The A. F. of L. brought an action in the Court of Appeals for the District of Columbia appealing the decision of the certification proceeding. The Court of Appeals held that the Order, not being a final Order, could be reviewed only by an independent suit in equity brought in the District Court.

The A. F. of L. appealed this decision to the Supreme Court where the decision of the Court of Appeals was upheld, the Court stating at page 404:

"The single issue which we are now called on to decide is whether the certification by the Board is an 'order' which, by related provisions of the statute, is made reviewable upon petition to the Court of Appeals of the District or in an appropriate case to a circuit court of appeals. The question is distinct from another much argued at the Bar, whether petitioners are precluded by the provisions of the Wagner Act from maintaining an independent suit in a district court to set aside the Board's action because contrary to the statute, and because it inflicts on petitioners an actionable injury otherwise irreparable."

The Court continues, page 412:

"The Board argues that the provisions of the Wagner Act, particularly § 9(d), have foreclosed review of its challenged action by independent suit in the district court, such as was allowed under other acts providing for a limited court review in *Shields v. Utah Idaho Central Railroad Co.*, 305 U.S. 177, 59 S.Ct. 160, 83 L.E. 111, and in *Utah Fuel Co. v. Na-*

II.

THE QUESTION IS WHETHER THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA HAS JURISDICTION TO ENTERTAIN A SUIT IN EQUITY BASED ON A COMPLAINT ASSERTING THE INFRINGEMENT OF CONSTITUTIONAL RIGHTS, NOT TRANSPARENTLY FRIVOLOUS, OF CITIZENS OF THE UNITED STATES BY THE NATIONAL LABOR RELATIONS BOARD AND ASKING FOR AFFIRMATIVE RELIEF TO ENJOIN SUCH INFRINGEMENT, NO OTHER METHOD OF REVIEW BEING AVAILABLE TO THE APPELLANTS.

The Trial Court answered the Question in the negative.

The jurisdiction of the District Court conferred by Section 1331, 28 U.S.C.A., *supra*, is manifestly broad enough to encompass the subject matter of this type of controversy, unless limited by some particular statute, such as Section 10 of the National Labor Relations Act, *supra*. Not being a party to the certification proceeding, the appellants have no rights for a review as provided by Section 10 or other sections of the Act. The Regional Director in his Report to the Board refused to consider objections filed by these appellants on the basis that they were not parties to the proceeding.

The appellees have recognized the jurisdiction of the District Court to entertain an action such as is here brought by the appellants. The appellees in the Seventeenth Annual Report of the National Labor Relations Board for the fiscal year ending June 30, 1952, on page 268 state:

“* * * The courts uniformly reaffirmed the principle that representation proceedings before the Board are reviewable only in connection with an Unfair Labor Practice proceeding under Section 10, and that

“* * * It has repeatedly been held that the right of the laborer to enter into contracts for his services is property within the meaning of the constitutional guaranties; that the constitutional right of every man lawfully to acquire property includes the right of making contracts for personal services as a means of acquiring property; and that each person is entitled to make such contracts in reference to such lawful business or occupation as he may choose, free from hindrance or obstruction by his fellow man, except for the protection of equal or superior rights on their part. * * *”

11 Am. Jur. 1170, Constitutional Law § 344.

The U. S. Supreme Court in *Texas and N.O.R. Co. v Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 50 S.Ct. 427 (1930) held that the right to the selection of representatives to confer with the employer in relation to contracts of service is a property right and when invaded results in irreparable injury to a property right.

In *T. B. Coppage v. State of Kansas*, 236 U.S. 1, 35 S. Ct. 240, it is said:

“The principle is fundamental and vital. Included in the right of personal liberty, in the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.”

who voted not to be represented by the Brewery Workers Union are deprived of their constitutional rights without due process of law.

Thus by the illegal and arbitrary action of the appellees in denying the appellants DePratter, Mobley, Traina and Diaz their right to vote, these appellants, appellant Miller, and all of the other employees who did not desire the Brewery Workers Union as a bargaining agent, were deprived of their liberty and property rights (in their freedom to bargain individually with their employer in respect to rates of pay, wages, and other conditions of employment without the intervention of the Brewery Workers Union as bargaining agent). The aforesaid illegal and arbitrary action of the appellees would require the appellants to work under a contract not of their making, but made by a bargaining agent illegally chosen. Appellants and the other employees who voted against the Brewery Workers Union are likewise deprived of their right to choose a union more appropriate than the Brewery Workers Union to represent them and bargain for them with their Employer.

Liberty of contract is universally recognized and is conceded to be in the protection of the Fourteenth Amendment and the Fifth Amendment to the Constitution of the United States. The privilege of contracting is generally said to be both a liberty and a property right. 11 Am. Jur. 1154, 1155, Constitutional Law § 339.

The guarantee provided by the Constitution for the protection of the right to contract, as a property right, is not provided in express terms; but the protection exists as a necessary inference from the guarantee of general property rights. The privilege of pursuing an ordinary calling or trade and of acquiring, holding or disposing of property also includes the right to make contracts in relationship with others.

jured if appellants DePratter, Mobley, Traina and Diaz were excluded from the unit. The contention would be that these four appellants would be outside of the unit and the Brewery Workers Union would not technically be their bargaining agent and that therefore these four appellants would be free to bargain individually with their employer. The question would then be, how the appellants would be injured even though the exclusion of DePratter, Mobley, Traina and Diaz was unlawful.

This is an erroneous contention since DePratter, Traina, Mobley and Diaz would still work within the unit a majority of their time and would only work under the conditions set by a bargaining agent contrary to their desires. Even though, theoretically they would remain free to negotiate their own wages and working conditions, the fact remains that they would work under the wages, hours, and conditions of employment set by the Brewery Workers Union, a bargaining agent contrary to their desires and which would not have been selected had these four appellants been permitted to vote.

Furthermore, the contention that the appellants would not be injured by the illegal exclusion of DePratter, Mobley, Traina and Diaz from the unit fails to take into consideration the infringement of the constitutional rights of appellant Miller and the other employees who voted not to be represented by the Brewery Workers Union. It has been shown that the votes of DePratter, Mobley, Traina and Diaz would have changed the results of the election and that their exclusion from the unit and from the election was unlawful. Appellant Miller and the other employees who voted "no" in the election were thereby reduced from a majority to a minority by the illegal and arbitrary action of the appellees in preventing the appellants, DePratter, Mobley, Traina and Diaz, from voting. The election was therefore not in accordance with due process. The appellant Miller and the other employees

and the same bargaining agent would have been chosen. Thus in this hypothetical case the appellants would have been deprived of due process but without any loss resulting therefrom.

Not so in the case at bar—the votes of appellants DePratter, Mobley, Traina and Diaz were sufficient to change the outcome of the election. The results of the election were:

58 votes for the Brewery Workers Union,
55 votes against the Brewery Workers Union,
1 vote challenged.

The one vote which was challenged is the vote of appellant Miller, and is a vote against the union. If the appellants DePratter, Mobley, Traina and Diaz had been permitted to vote the results of the election would have been:

58 votes for the Brewery Workers Union
60 votes against the Brewery Workers Union.

It is therefore seen that the denial of due process to these appellants by illegally preventing them from participating in the election resulted in the selection of the Brewery Workers Union as the bargaining agent for appellants and their fellow employees, a result which would not have occurred had appellants DePratter, Mobley, Traina and Diaz been permitted to vote. The appellants, including appellant Miller and the other employees who voted not to be represented by the Brewery Workers Union, were thereby deprived of their right to bargain individually with their employer or to select a bargaining agent more appropriate than the Brewery Workers Union.

Although it has previously been shown that any exclusion of appellants DePratter, Mobley, Traina and Diaz from the unit would be an unlawful exclusion, the question might be asked as to how the appellants would be in-

to his casting a ballot waived the employer's challenge. The Court upheld the Board's rule as to post-election challenges; it being the Board's position that once a vote has been cast without challenge an objection cannot later be raised to the eligibility of the employee casting that ballot. Clearly, those are not the circumstances presented in this case. Here there is no question of challenged votes since these employees were not even permitted to vote (with the exception of Miller, whose vote was challenged). In this respect, see *NLRB v. Wilkening Mfg. Co.*, *supra*, in which the Court said:

"One other point is urged by the Board with reference to the Lyons objection—that it is a post-election challenge and therefore of no merit. Miss Lyons' vote was not challenged. It could not have been for she made no attempt to vote. She never even knew she had been declared qualified until after the polls had been closed by the Board agent."

It is therefore urged that the appellants, DePratter, Mobley, Traina and Diaz, were entitled to vote in the election and that any exclusion of these appellants from the election would be arbitrary and capricious action rendering the election unlawful and contrary to due process.

B. *The complaint asserts the loss of a substantial constitutional right.*

It has been shown that the election in this case was not held in accordance with due process. The question to be considered now is whether the appellants suffered any loss as a result of the illegal election.

Even though the appellants were denied due process, they have no cause of action unless a substantial loss was incurred by them as a result of the denial of due process. For example, although the appellants were wrongfully denied the right to vote, as is the case here, if their votes would have been insufficient in number to affect the outcome of the election, no damage would have resulted—the outcome of the election would have remained the same

tions which developed was highly desirable. Nevertheless, we are unable to find any reasonable excuse for the acceptance of the extremely dubious, inequitable result. On the facts it cannot be held to comply with the mandate of the Act. As we said in *NLRB v. National Biscuit Co.*, 3 Cir., 1950, 185 F. 2d 123, 124.

'The powers conferred upon this court by the National Labor Relations Act to enforce the orders of the Board are equitable in nature and may be invoked only if the relief sought is consistent with the principles of equity.'

The final tally showed that the union had been selected by a majority of two. If Miss Lyons and Mrs. Humphreys had voted and had voted against the union the count would have been tied and the union could not have been certified. With both or either of them voting, Miss Elder's ballot could have been decisive."

In the case at bar, it is the injured employees who are complaining of their exclusion from the election. Their standing in this Court to complain that their property rights in making their contract terms have been violated is certainly more to be respected than that of the employer who was, in the *Wilkening Mfg. Co.* case, upheld in his contention that all employees entitled to vote must be allowed to vote in order that the election results be valid. Unless appellees are restrained by the District Court, the contract conditions under which the appellants must work will be set without their having an opportunity to be heard.

This Court should not be misled by the rule laid down in *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 66 S.Ct. 1011 (1946), which at first glance would seem to be similar to the case at bar. In that case the difference in the result of the election was only one vote. After the election, the employer contended that one of the employees who voted was ineligible to vote. The court held that the employer's failure to challenge the vote of this employee prior

eligible to vote but was not contacted and notified of this ruling, and therefore did not vote. The third of these employees was notified of the change in ruling allowing her to vote but was not relieved from her job until five minutes before voting ceased and when she arrived at the polls a few minutes after voting ceased she was not allowed to vote. Two of these employees did not actually endeavor to vote.

Later the company refused to bargain with the union, claiming the election was illegal because these employees were not allowed to vote. The Board found the company guilty of an unfair labor practice for refusing to bargain with the Union. The Court of Appeals held that the result of the election from which these employees were wrongfully excluded was so dubious and inequitable that it was invalid, and, therefore, the employer was not guilty of an unfair labor practice in refusing to bargain. The Court states in its decision (p. 100):

"The Board admittedly has a wide discretion in the conduct of an election under the Act but it must function '* * * in accord with the principles which Congress indicated should be used in securing the fair and free choice of collective bargaining representatives.' National Labor Relations Board v. A. J. Tower Co., 329 U.S. 324, 67 S.Ct. 324, 328, 91 L.Ed. 322. Whether it acted in this instance '* * * fairly and equitably in light of the realities involved' (Tower case, supra, 329 U.S. at page 333, 67 S.Ct. at page 329) is the fundamental issue before us. Under Section 7 of the National Labor Relations Act as amended, 29 U.S.C.A. § 157, the all important purpose of the instant election was to give the employees true representation in their collective bargaining with their employer. The decisions on the problems arising in connection with the election could have and may have changed the result, and the Board's experienced and expert judgment in resolving them is entitled to great weight. The task of supervising this particular election was not easy, especially when it is borne in mind that prompt disposition of the ques-

to vote to these appellants resulted from the action of Board agents, and even the Regional Director in his report admits this (App. 59)). If an employee is qualified to vote and is prevented from voting, then as to him, and all others whose rights would be adversely affected by his failure to vote, there is a denial of due process. Nevertheless, his Constitutional rights are not affected by this illegal action unless it can be shown that his vote would have altered the result of the election. In the present case, the votes of any three of the five appellant employees would have changed the outcome of the election. The appellants, as well as those employees in the bargaining unit who desired to vote and did vote against the union, were deprived of their right to make an individual contract with their Employer. They must, if this certification order is issued, contract and work for their Employer under conditions set by an agent who is not the choice of the true majority of the employees within the unit who were eligible and desired to vote, but rather the choice of only a minority.

An election which is not in accordance with due process and which violates the intention of the National Labor Relations Act that such majority vote shall control, is not a valid election and is illegal and void. The election in this case was illegal.

In *National Labor Relations Board v. Wilkening Mfg. Co.*, 207 F. 2d 98 (3rd Cir.—1953), the Court found an election illegal and void on facts which do not as clearly show a deprivation of the employees' right to vote as do the instant facts. There, as here, certain employees were told before the election that they were not eligible to vote. The employer had agreed with the Board agent that the three employees were not qualified to vote. One of these employees voted but the vote was challenged and not counted; and the ballot was later lost. Five minutes before voting ceased a second of these employees was found

In addition, the Regional Director's Report is not an affidavit, which under proper circumstances might be considered, but it is rather a compilation of conclusions of fact drawn from other affidavits not before this Court. It is not even limited to conclusions of fact, but contains arguments on those facts and credibility findings which are contrary to the allegation of the Complaint. It accordingly could not be considered by the Court for the facts alleged therein, or for any other purpose.

This Honorable Court should also note that the lower Court did not rule on the appellees' Motion for Summary Judgment because it granted appellees' Motion to Dismiss. The affidavit and exhibit were not attached to or made a part of the Motion to Dismiss and therefore, could not have been considered.

Although it must be admitted that the rights of these appellants to contract individually with their Employer may be delegated to a bargaining agent contrary to their desires when the agent is chosen by a majority of the employees within the unit, this deprivation of the right to contract individually is in accordance with due process of law. The National Labor Relations Act has, in Section 9(c), provided a procedure whereby a majority of the employees may delegate the Constitutional rights of all employees to a bargaining agent. But this can only be done by a majority of employees eligible and desiring to vote.

An election is not in accordance with the due process provided by the National Labor Relations Act and guaranteed by the Constitution unless all employees qualified are given an opportunity to vote. If qualified employees are deprived of this right to vote, it is unimportant from a due process standpoint whether the deprivation is at the instance of the Employer, the Union, or the Board agent. The employees have their Constitutional Rights and rights under the Act that must be protected. (The Complaint alleges as a fact that the denial of the right

in support of a Motion to Dismiss may not be considered, for purposes of the Motion, as proof contradictory to well-pleaded facts in the Complaint. *Farrall v. District of Columbia Amateur Athletic Union, supra.*

The Court may consider and weigh affidavits filed in opposition to and in support of a Motion to Dismiss for lack of jurisdiction, and may, in its discretion, hear and determine the question of jurisdiction on the basis of such affidavits, since jurisdiction is a threshold issue in every case, *Kvos, Inc. v. Associated Press*, 299 U.S. 269, 57 S. Ct. 197 (1936); but this procedure must be distinguished from a decision on the merits of the appellants' claim for relief. If the jurisdictional basis asserted by appellants is, as here, a claim arising under the Constitution of the United States, and is not transparently frivolous, the District Court has jurisdiction to determine the merits of the claim and may not dismiss the action "for want of jurisdiction however wanting in merit may be the averments intended to establish a federal right." *Hart v. B. F. Keith Vaudeville Exchange*, 262 U.S. 271, 43 S.Ct. 540 (1923).

In the case at bar, appellants have asserted the infringement of a constitutional right—a denial of due process in the deprivation of appellants' right to contract individually with their Employer or to select a more appropriate bargaining agent—as the basis upon which the District Court has jurisdiction to grant them relief. The Regional Director's Report contains conclusions of fact, in addition to other matters, which contravene the allegations that appellants were within the bargaining unit and were unlawfully denied their right to vote—i.e., the merits of appellants' claim. But the claim itself is the jurisdictional ground asserted. The Report, therefore, should not have been considered by the Court below in granting the appellees' Motion to Dismiss and should not be considered in determining whether the Court below was in error.

Cir.-1945), reversing 58 F. Supp. 366 (D.C.Md.-1944); *International Union of Operating Engineers, A. F. of L., Local No. 148 v. International Union of Operating Engineers, A. F. of L., Local No. 2, et al.*, 173 F.2d 557 (8th Cir.-1949).

The appellants do not contend that this present action is an appeal provided by the Act. Quite to the contrary, the appellants contend, and the appellees cannot deny, that there is no method provided by the Act to obtain review of the representation proceedings of the Board by these appellants. There is no method of review open to these appellants for the protection of their constitutional rights save in a Court of Equity.

The review procedures provided by the Act clearly cannot be exercised by these appellants. The only method of review provided by the Act is where the representation proceedings are made a part of an unfair labor practice proceeding. There is no way in which these appellants can institute this method of court review.

The cases cited previously involved the rights of unions that were infringed by action of the Board. The Court should note the distinction between the case at bar and those involving infringement of the rights of unions. Where the union is the complaining party, the right which has been infringed, i.e., the right to act as a bargaining agent, was created by the National Labor Relations Act. However, that is not the case with these appellants. The right they seek to have protected, that is, their right to contract individually with their Employer—the right of a man to labor and to enjoy the fruits of his labor—is an inherent right, a natural prerogative, protected by the Constitution.

III.

THE QUESTION IS WHETHER THE APPELLANTS (EMPLOYEES) WHO HAVE NO ADMINISTRATIVE REMEDY AND WHO HAVE NO RIGHT TO BE A PARTY TO ADMINISTRATIVE PROCEEDINGS INSTITUTED BY ANOTHER (THE EMPLOYER), WHICH PROCEEDINGS CAN IRREPARABLY INJURE OR DESTROY THEIR CONSTITUTIONAL RIGHTS, MUST AWAIT THE FINAL OUTCOME OF THE ADMINISTRATIVE PROCEEDINGS AND THE DESTRUCTION OF THEIR CONSTITUTIONAL RIGHTS BEFORE INSTITUTING COURT PROCEEDINGS TO PROTECT THESE CONSTITUTIONAL RIGHTS.

The Trial Court answered this Question in the affirmative.

Immediately after the election the appellants protested to the Regional Director of their denial of a right to vote in the election by filing objections with him asking that the election be set aside so that their deprivation of a right to vote might be considered. The Regional Director in his Report to the Board refused to consider the objections filed by these employees on the basis that they were individual employees and not considered parties to proceedings and therefore had no standing to object to the conduct of the election. (App. 48-49).

The appellants, being individual employees of the Employer, are not permitted under the Act to object to the conduct of the election by the Board, by the Employer or by the Union. In *Times Square Stores Corporation*, 79 NLRB 361 (1948), the Board refused to consider exceptions filed by individual employees. In footnote 2, on page 362, the Board said:

"Counsel for the individual filed a letter in the nature of exceptions to the original Director's Report on Objections and Challenges. Section 203.61 of the Board's

Rules and Regulations permits exceptions to a report on objections to be filed by the 'parties' to the representation proceeding. We do not consider the individual employees to be parties to the instant proceeding within the definition of 'party' in Section 203.8 of the Rules and Regulations, and therefore we shall not entertain the aforesaid objections."

With like effect see: *Westinghouse Electric Corporation*, 78 NLRB 315 (1948); *Wilson and Company, Inc.*, 82 NLRB 405 (1949); and *Dadourian Export Corporation*, 80 NLRB 1400 (1948).

Thus it is clear that the individual employees, the appellants in this action, have not and could not have been considered parties to the administrative proceedings. When these appellants brought the illegal action to the attention of the Board Representative, he held that they had no standing before the Board because they were not parties. This made it apparent that the appellants have no administrative remedy because they have no standing before the administrative agency.

While it is the rule that one who has an administrative remedy and who is a party to an administrative proceeding must exhaust his administrative remedies before seeking judicial relief, this rule does not apply to persons who are aggrieved by the actions of the administrative agency but who are not parties to the proceedings and who have no administrative remedy available to them. In fact, the rule does not even apply to *parties* if under the facts of the particular case there is *no* administrative remedy available to them.

This is not a case of an exception to the rule, but rather a case of a set of facts which are entirely outside the scope of the rule. However, it is treated as an exception in 73 C. J. S. 354, Public Administrative Bodies and Procedure, § 41, where the law is stated as follows:

"*Exceptions to rule.* The rule that administrative remedies must be exhausted before resort is had to

the courts is not absolute and without exceptions. The rule will be departed from in extreme cases, where compliance with the rule would be futile; where the statute is charged to be void on its face; where one party uses an administrative proceeding as a tool to accomplish a fraud on another who is powerless to defend; or where irreparable injury would result.

"The rule is inapplicable where no administrative remedy is provided. Likewise, the rule will be relaxed where there is grave doubt as to the availability of the administrative remedy; where the question in dispute is purely a legal one, and nothing of an administrative nature is to be or can be done; where, although there are steps to be taken they are, under the admitted facts, merely matters of form, and the administrative process, as a process of judgment is really over, . . ." (our emphasis)

In *Allen v. Grand Central Aircraft Company*, 347 U.S. 535, 74 S.Ct. 745 (1954), the Supreme Court reviewed the validity of the action of an administrative body in a suit which enjoined a hearing to be held by that administrative body. The Court in that case held that if there was no administrative procedure available, then the rule of exhaustion of administrative remedy would not apply. In the case at bar, no administrative remedy is available to these appellants.

Under the Board's rules and regulations the Regional Director is given the power to certify the successful Union in an election unless objections are filed thereto by parties to the proceeding or there are sufficient challenged notes to affect the result of the election. This is an automatic act on the part of the Regional Director. Since the appellants are not considered parties, there is nothing that they did or could do, as far as administrative appeal is concerned, which would have prevented the Regional Director from certifying the Brewery Workers Union. Here, a third party, one of the parties to the original administrative proceedings, has availed itself of its administrative remedy (which is unavailable to appellants) by tak-

ing an administrative appeal which seeks to accomplish approximately the same result as the appellants are seeking to accomplish by this suit. However, this third party does not represent appellants. Its interests are different from those of the appellants. Appellants have no way whatever of having their interests represented or protected in the administrative proceedings.

Therefore, the appellants should not, in justice, be denied their right to bring this action simply because a third party has instituted administrative proceedings which appellees claim would protect the interests of the appellants.

The present proceedings before the Board were instituted by objections filed by the Employer and do not concern the appellants. It is true that should the Board find that these objections by the Employer are well taken, irreparable damage will not result to the appellants. Nevertheless, it is entirely possible, if not probable, that the Board will find that the Employer is estopped to raise the objection concerning the denial of these appellants' right to vote. The Employer, by his objection, seeks to protect his rights under the Act—not the Constitutional rights of the appellants. The Employer's rights will be determined on the merits of his case, not on the merits of the appellants' cause of action. The fact that his rights may have been invaded by the appellees' action against these appellants is only coincidental. The appellees may have invaded the Employer's rights as well as the appellants' rights, but the fact that the Employer has sought redress for his grievance cannot prevent these appellants from seeking redress for their injury. The fact that the Employer may be successful in seeking redress for the wrong inflicted on him might render the present proceedings moot because the redress he may obtain would prevent irreparable damage from occurring to the appellants, does not deprive the appellants of their right to bring

this action. The Board could decide that the Employer's rights had not been invaded in this case and find against the Employer although the Board itself were convinced of the merits of the contention appellants make in this suit. However, the fact that it might be determined that the Employer's rights had not been invaded does not determine whether or not the appellants' rights have been invaded. In other words, the administrative proceeding presently pending before the Board will not determine the merits of the appellants' position. If the administrative proceedings result in a finding against the Employer, the Employer will be required immediately to bargain with the Union. At this point the irreparable damage to these appellants will have been done and they will have been deprived of their constitutional rights without *ever* having had available to them *any* remedy, administrative or judicial. Appellants cannot thus be required to have their constitutional rights hang on the thin thread of the merits of another's cause of action. The action of the appellees that the appellants seek to have this Court review will not and cannot be decided in proceedings now pending before the Board, and after the proceedings before the Board have been concluded the irreparable damage to the appellants will have been done. Furthermore, under the decision of the Board, the Employer could withdraw its objection to the election at this time. Should the Employer do this, the Board would immediately certify the Brewery Workers Union without inquiring into the merits of the Employer's objections unless restrained from so certifying by the District Court. Certainly it cannot be contended that the jurisdiction of a Court of Equity depends on the whim of a third party, especially one who may have been a party to the deprivation of the appellants' constitutional rights.

So far as the appellants are concerned, the action of the appellees which the appellants seek to review is completed. The appellants ask that this Court determine

whether the action of the appellees in depriving the appellants of their right to vote was a denial of due process. The appellees have denied the appellants due process when they deprived them of the right to vote. Further action on the part of the appellees, in certifying the Union, will result in irreparable damage to the appellants. Their constitutional right to contract with their Employer, individually, and without the intervention of the Brewery Workers Union, which right is now in a state of suspension, will be destroyed.

CONCLUSION

Appellants respectfully point out that they have a constitutional right to contract with their Employer, that this constitutional right has been infringed and denied them without due process. The appellants' right to bargain individually with their Employer can lawfully be denied only by due process. In accordance with the National Labor Relations Act, a majority vote of the Employees comprising a unit may select a bargaining agent, which selection will be binding upon the minority. In such an election all those Employees within the unit must be allowed to vote who desire to vote, otherwise a true majority of eligible Employees desiring to vote may not be determined. The appellants have shown that they are eligible and that their vote would have been decisive of the election, changing its result, and thus their constitutional rights have been taken away without due process.

It is clear under the Act that the appellant Employees have no right as parties to the proceeding before the National Labor Relations Board. They can not appeal any ruling of the Board in this Court. They are helpless unless their rights can be protected in a Court of Equity.

It is interesting to note that the theory behind the Act creating the National Labor Relations Board was that it was for the protection and benefit of Employees. How-

ever, in the procedure set up to protect these rights, and in the actual practice, it has become a question between unions, now most powerful organizations, and employers, some large and some, as in this instance, small. The rights of the Employees themselves are forgotten.

If it is held that Employees have no right to go into a Court of Equity to have their constitutional rights protected when they have been infringed, then the study of the Act and of the decisions of the NLRB and the Courts will make it quite clear that an Employee is without a protective forum.

They are the one group which is never permitted a day in Court.

Respectfully submitted,

CODY FOWLER
Citizens Building
Tampa, Florida

DAVID C. BASTIAN
Colorado Building
Washington, D. C.
Attorneys for Appellants

Of Counsel:

FOWLER, WHITE, GILLEN, YANCEY and HUMKEY
1002 Citizens Building
Tampa 2, Florida

DRURY, LYNHAM & POWELL
312 Colorado Building
Washington, D. C.

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,874

RUTH DEPRATTER, VERA MOBLEY, BILLIE TRAINA,
AUDREY MILLER, AND JOE DIAZ, APPELLANTS

v.

GUY FARMER, ABE MURDOCK, IVAR H. PETERSON,
PHILIP RAY RODGERS, AND BOYD STEWART LEEDOM,
INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF
THE NATIONAL LABOR RELATIONS BOARD, APPELLEES

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

THEOPHIL C. KAMMHOLZ,

General Counsel,

DAVID P. FINDLING,

Associate General Counsel,

MARCEL MALLET-PREVOST,

Assistant General Counsel,

NORTON J. COME,

ROBERT G. JOHNSON,

Attorneys,

National Labor Relations Board,

Washington 25, D. C.

*United States Court of Appeals
For the
District of Columbia Circuit*

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Joseph W. Stewart
CLERK

STATEMENT OF QUESTIONS PRESENTED

1. Whether the District Court properly dismissed the instant suit for failure to exhaust administrative remedies.

2. Whether the District Court properly concluded that it lacked jurisdiction to review a representation proceeding under Section 9 of the National Labor Relations Act, at the suit of employees allegedly aggrieved by Board action therein.

3. Whether, in any event, the employees have a claim warranting judicial relief.

(1)

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,874

RUTH DEPRATTER, VERA MOBLEY, BILLIE TRAINA,
AUDREY MILLER, AND JOE DIAZ, APPELLANTS

v.

GUY FARMER, ABE MURDOCK, IVAR H. PETERSON,
PHILIP RAY RODGERS, AND BOYD STEWART LEEDOM,
INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF
THE NATIONAL LABOR RELATIONS BOARD, APPELLEES

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia (J. A. 66A-67A),¹ dismissing appellants' complaint for injunctive relief and vacating an *ex parte* temporary restraining order previously entered, which

¹ The record in this case has been printed as a joint appendix and will be designated herein as "J. A." The Decision and Certification of Representatives, issued by the Board on October 26, 1955, after this appeal was taken, is set forth as Appendix A, and the relevant statutory provisions are set forth as Appendix B, at the end of this brief.

enjoined the Board from certifying a collective bargaining representative pursuant to Section 9 of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*, hereinafter referred to as the Act). The jurisdiction of this Court is invoked under 28 U. S. C. 1291, 1292, 1294.

STATEMENT OF THE CASE

A. Events preceding the filing of appellants' suit

On February 14, 1955, the International Union of United Brewery, Flour, Cereal, Soft Drink, and Distillery Workers of America, CIO (hereinafter referred to as the Union) filed a petition with the Board, pursuant to Section 9 of the Act, requesting that an election be held among the employees of Shoreline Enterprises of America and Shoreline Packing Corporation (hereinafter referred to as the Company) to determine whether or not they desired to be represented by the Union for purposes of collective bargaining (J. A. 3A, 37A). Thereafter, a hearing was held to determine the appropriate unit for purposes of the election, testimony was taken with respect to the duties of various Company employees, and the Company and Union stated their positions with respect to the exclusion of certain employees from the unit, including 4 of the 5 appellants herein (J. A. 37A, 39A, n. 2, 51A, n. 14).

Before the Board determined the unit question, the Company and the Union resolved it by entering into a stipulation for consent election pursuant to Sec. 102.54 (b) of the Board's Rules and Regulations, agreeing that an election be held in a unit of

"all production and maintenance employees including refrigeration engineers; excluding truck drivers and excluding all office employees and all clerical employees, professional employees, guards and/or watchmen and supervisors as defined in the Act" (J. A. 3A, 24A-25A). The execution of this stipulation was preceded by a discussion between the Union and Company representatives concerning the status of Appellants DePratter, Diaz, Traina, and Mobley, whereupon the parties specifically agreed to exclude from the unit "truck drivers" and "all clerical employees", and the names of these four appellants were stricken from the list of eligible voters (J. A. 21A, 49A-51A, Appendix A, *infra*).

On April 4 and 5, 1955, the Board conducted the election in accordance with the stipulation; Appellants Diaz, Traina, and DePratter did not attempt to vote since they had been advised by the Company that they were ineligible and Appellant Mobley appeared at the polls and, upon being told that she was ineligible but could cast a challenged ballot if she chose, left without voting (J. A. 6A-8A, 52A-58A). In addition, the eligibility of Appellant Miller was questioned by a Union observer when she appeared at the polls, whereupon she cast a ballot under challenge which was impounded (J. A. 6A).

Following the election, the ballots were counted and the tally showed that, of the approximately 145 eligible voters in the unit, 114 voted; 58 votes were cast for the Union, 55 against, and one vote was challenged, the challenged ballot being insufficient to affect the results of the election (J. A. 9A, 26A-27A).

Thereafter, on April 11, 1955, the Company filed objections to the election alleging, *inter alia*, that Appellants DePratter, Mobley, Traina, and Diaz were improperly denied the right to vote in said election (J. A. 10A, 37A, 39A).

On May 16, 1955, following an investigation of the Company's objections to the election pursuant to Sec. 102.61 of the Board's Rules and Regulations, the Board's Regional Director issued a Report on Election, Objections to Election and Recommendations to the Board, concluding that the objections should be overruled in their entirety (J. A. 38A-62A). With respect to the contention that Appellants DePratter, Mobley, Traina, and Diaz were improperly excluded from voting, the Regional Director recommended that the objection be overruled since these employees were excluded from the bargaining unit agreed to by the parties, and, therefore, were clearly not eligible to vote (J. A. 60A).²

On May 26, 1955, Appellants DePratter, Mobley, Traina, and Diaz filed with the Board a motion to intervene in the representation proceeding and exceptions to that portion of the Regional Director's report concerning their right to vote in the election (J. A. 37A). On June 7, 1955, the Company filed exceptions to that Report in its entirety, and also applied for leave to take depositions concerning one of its contentions, viz., that the Union observers at the election were paid organizers of the Union (*ibid.*).

² The Report did not deal with the challenged ballot of Appellant Miller, for, if the four other appellants were ineligible to vote, Miller's vote could not affect the outcome of the election.

B. The instant suit

Without awaiting the Board's decision, Appellants DePratter, Mobley, Traina and Diaz, together with Appellant Miller, brought the instant suit in the District Court, requesting that the Court intervene in the representation proceeding and enjoin the Board from certifying the Union as bargaining representative. Appellants' complaint was based on the theory that the Board, if permitted to proceed, would certify the Union as bargaining representative for a unit *including* appellants, thereby depriving appellants of their freedom to make individual employment contracts without having accorded them the right to vote in the Board election (J. A. 13A).

On June 1, 1955, the District Court (Curran, J.) granted an *ex parte* temporary restraining order against the Board. On June 28, 1955, following hearing on appellants' motion for a preliminary injunction and the Board's cross-motion to dismiss the complaint or for summary judgment (J. A. 35A-36A), the Court (Matthews, J.) granted the Board's motion to dismiss the complaint and vacated the temporary restraining order. The Court concluded that this was "an action to review a representation proceeding under Section 9 of the National Labor Relations Act and the Court is thus without jurisdiction of the subject matter of the action, and [Appellants] have failed to exhaust their administrative remedies" (J. A. 66A).

On July 28, 1955, appellants filed a notice of appeal. On October 13, 1955, this Court denied appellants' request for a temporary injunction pending disposition of the appeal.

C. The Board's decision and certification of representatives

On October 26, 1955, the Board issued its decision in the representation proceeding, certifying the Union as the collective bargaining agent for the unit of employees as set forth in the stipulation for a consent election (Appendix A, *infra*).³ The Board, after considering the objections to the election filed by the Employer and by Appellants DePratter, Traina, Mobley and Diaz, who were permitted to intervene in the Board proceeding (Appendix A, *infra*, p. 25, n. 1), concluded that they raised no substantial or material issues.

Respecting the contention that appellants were improperly deprived of their right to vote, the Board found that, before signing the election agreement excluding "truck drivers" and "all office employees and all clerical," the Employer's attorney had first checked with the Employer's vice-president and pointed out that these exceptions would have the effect of excluding from the bargaining unit Appellants DePratter, Mobley, Traina and Diaz. Accordingly, the stipulation signed by both the Employer and Union representative was intended to, and did, *exclude* these four employees from the unit sought to be represented by the Union, and, for this reason, the parties proceeded to strike the four employees from the voting eligibility list. In accordance with its settled policy of expediting the handling of representation cases by honoring concessions made by the parties, the Board concluded that this agreement was

³ This subsequent step in the proceeding is judicially noticeable by this Court. Cf. *Bowles v. U. S.*, 319 U. S. 33, 35.

controlling here, thereby depriving Appellants De-Pratter, Mobley, Traina and Diaz of standing to complain about their failure to vote in the election (Appendix A, *infra*, pp. 28-31).⁴

STATEMENT OF POINTS

The District Court's dismissal of appellants' complaint should be sustained.

SUMMARY OF ARGUMENT

Affirmance of the District Court's dismissal of the complaint is warranted on the ground of appellants' failure, at the time suit was instituted, to exhaust their administrative remedies. While appellants contended before the court below that they had no administrative remedy, they were in fact presenting the very contentions which form the basis for this action to the Board. Subsequent to the ruling of the District Court, the Board decided that four of the appellants were outside the bargaining unit to be represented by the Union. Accordingly, the principal injury complained of—that appellants would be represented by a union which they had no opportunity to vote against—has not materialized.

However, since the Court may desire to treat the suit at this stage as one contesting the validity of the Board's exclusion of appellants from the bargaining unit covered by the Board's certification, we proceed to show that the District Court's decision must nevertheless be sustained because: (1) that Court properly

⁴ Since, under this ruling, the challenged vote of Appellant Miller could not affect the outcome of election, the Board found it unnecessary to decide whether the challenge was proper.

concluded that it lacked jurisdiction to review Board action taken in a representation proceeding under Section 9 of the Act; and (2) in any event, the Board action complained of was valid and proper.

I.

Under Section 9 (d), Board representation determinations may be reviewed by the appropriate United States Court of Appeals, but only when they have become the basis for a "final order" of the Board issued in an unfair labor practice proceeding under Section 10. *A. F. L. v. N. L. R. B.*, 308 U. S. 401. Congress, both during the course of passing the original National Labor Relations Act and at the time of the 1947 amendments thereto, considered proposals which would have expanded court review of Board representation determinations, so as, *inter alia*, to provide a method of direct review for employees, in the situation of appellants here, who were adversely affected by a Board representation determination. It decided to retain the limited review provided in Section 9 (d) because it believed anything more would result in dilatory tactics in representation cases, thus frustrating the statute's basic policy of promoting collective bargaining. Accordingly, at least absent a substantial constitution question, which we show in II below is not presented here, the courts have declined to entertain the complaints of labor organizations or of employees that they have been injured by alleged improper action of the Board or its agents in conducting elections, defining appropriate units, and issuing certifications under Section 9 of the Act.

Particularly in point are this Court's decisions in *Reilly v. Millis*, 79 App. D. C. 171, 144 F. 2d 259, cert. den., 325 U. S. 879, and *Millis v. Inland Empire District Council*, 79 App. D. C. 214, 144 F. 2d 539, aff'd on other grounds, 325 U. S. 697. In both of these cases, this Court affirmed the dismissal by the District Court of complaints in independent equity suits, which asserted that the bargaining unit defined by the Board was arbitrary and capricious and resulted in the certification of a union as the employees' representative which would have been defeated had the unit been properly defined.

The validity of these holdings has not been affected by the fact that the Supreme Court, in affirming the *Inland Empire* decision, found it unnecessary to decide the jurisdictional question. Nor are they impaired by this Court's decision in *Farmer v. United Electrical Workers*, 93 App. D. C. 178, 211 F. 2d 36, 39-40, cert. den., 347 U. S. 943, that the District Court had jurisdiction to determine whether the Board possessed statutory authority to inquire into the truth or falsity of non-Communist affidavits filed with it under the Act; that case, unlike the instant one, entailed Board action wholly "preliminary" to a particular unfair labor practice or representation proceeding, and, in this Court's view, "plainly beyond the scope of [the Board's] statutory authority" (211 F. 2d at 40).

II.

In any event, no claim warranting judicial relief is presented. Appellants' basic contention, as revealed by their complaint, is that Board certification of the

Union would deprive them of their right to make individual contracts of employment without due process, in that they would be forced to bargain through an agent which their votes, had they not been improperly blocked, could have defeated. This contention fails to present a substantial constitutional question for the reason, *inter alia*, that the Board, in certifying the Union, found that four of the appellants were specifically excluded from the bargaining unit represented by the Union. Accordingly, their failure to vote has resulted in no loss to them, for, not being in the bargaining unit, they remain free to bargain individually with their employer concerning their working conditions even when doing production work.

Appellants' complaint thus reduces itself to an attack on the propriety of the Board's determination, excluding four of them from the unit found to be appropriate for collective bargaining. This is not a constitutional question but merely one of whether the Board's action exceeded its powers under the Act. For reasons hereafter given, we submit that the action taken was valid and proper and did not constitute an abuse of the broad discretion which Section 9 of the Act vests in the Board with respect to determining appropriate units and conducting representative elections.

The election herein was conducted in accordance with the Board's consent election procedures, which are a means of furthering the Congressional policy of expediting representation determinations. In keeping with the nature and purposes of these procedures, it is established Board policy to honor con-

cessions made by the parties and to reject post-election challenges to the unit based solely upon the fact that employees have been excluded, whether through inadvertence or design, who could have been included, without rendering the unit inappropriate. The Board action herein was in accord with this well settled policy.

Thus, the Company and the Union agreed to a unit of production and maintenance employees, excluding, *inter alia*, truck drivers and clericals. In so doing, the Board found that the parties specifically contemplated excluding four of the appellants notwithstanding that they may also have performed some production work. Since the stipulated unit excluding these employees would not be inappropriate under prior Board decisions, the Board properly honored this stipulation and held that these appellants were excluded from the unit covered by the certification issued to the Union.

ARGUMENT

Introduction

The District Court dismissed appellants' complaint on alternative grounds: (1) failure to exhaust administrative remedies; (2) lack of jurisdiction over the subject matter. The propriety of the first ground is demonstrated by the Board's subsequent decision in the representation proceeding (Appendix A, *infra*, pp. 24-32). Contrary to appellants' contention that they had no remedy before the Board (Br. 44-49), the Board decision shows that, while appellants were in the District Court, they⁵ were presenting the identical contention respecting their right to vote in the elec-

⁵ Except for Appellant Miller, see notes 2, 4, *supra*.

tion to the Board; that the Board thereafter concluded that appellants had not been eligible to vote since they were excluded from the unit for which the Union would be certified as bargaining representative; and that, accordingly, the principal injury complained of—that appellants would be represented by a union which they had no opportunity to vote against (J. A. 11A-13A)—has not materialized. In short, the District Court's declination to anticipate the Board's decision achieved the very purpose which the exhaustion of administrative remedies doctrine seeks to accomplish, viz, "to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings" (*Aircraft Diesel Corp. v. Hirsch*, 331 U. S. 752, 767).

Appellants' failure to exhaust administrative remedies before instituting the suit, we believe, would in itself warrant summary affirmance of the District Court's dismissal of the complaint.⁶ However, this Court, in view of the certification meanwhile issued by the Board and appellants' anticipatory attack thereon in its brief (pp. 18-32), may desire to treat the suit at this stage as one contesting the validity of the Board's exclusion of appellants from the bargaining unit covered by the certification. In this event, as we show below, the dismissal of the complaint must still be sustained, because: (1) the District Court properly concluded that it lacked jurisdiction to re-

⁶ *Aircraft Diesel Corp.*, *supra*; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51; *Rochester Telephone Corp. v. U. S.*, 307 U. S. 125, 130; *Whitehouse v. Illinois Central R. R.*, 349 U. S. 366, 373-374.

view Board action taken in a representation proceeding under Section 9 of the Act; and (2) in any event, the Board action complained of was valid and proper.

I.

The District Court properly concluded that it was without jurisdiction of the subject matter of the action

The federal district and appellate courts have consistently held that neither the Act, nor the general provisions of the Judicial Code (e. g., 28 U. S. C., § 1337) vest the District Courts with a reviewing jurisdiction over Board action in representation proceedings under Section 9 of the Act. "All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." *Switchmen's Union v. National Mediation Board*, 320 U. S. 297, 301. And Congress has deliberately decided to preclude court review of representation determinations except as provided in Section 9 (d) of the Act.

Thus, under Section 9 (d) representation determinations may be reviewed by the appropriate United States Court of Appeals, but only when they have become the basis for a "final order" of the Board issued in an unfair labor practice proceeding under Section 10. *A. F. L. v. N. L. R. B.*, 308 U. S. 401. Congress, both during the course of passing the original National Labor Relations Act and at the time of the 1947 amendments thereto, considered proposals which would have expanded court review of Board representation determinations, so as, *inter alia*, to provide a method of direct review for employees, in

the situation of appellants here, who were adversely affected by a Board representation determination. It decided to retain the limited review provided in Section 9 (d) because it believed anything more would result in dilatory tactics in representation cases, thus frustrating the statute's basic policy of promoting collective bargaining. See *Norris, Inc. v. N. L. R. B.*, 85 App. D. C. 106, 177 F. 2d 26, 28, n. 9 (C. A. D. C.)

For example, Section 10 (f) of the House version of the bill embodying the 1947 amendments to the Act provided for direct review by the Courts of Appeals of certifications of representatives. H. Rep. No. 245, 80th Cong., 1st Sess., 59-60, 1 Legislative History of the Labor Management Relations Act, 1947 (G. P. O. 1948), pp. 350-351. In explanation of this proposal, the House Report stated (*Id.* at 43, 1 Leg. Hist. 334):

The present act permits appeals from certifications by the Board only by employers, and then only through cumbersome proceedings that always involve risk of strike and of a finding that, by following the only course by which he could appeal, the employer committed an unfair labor practice, no matter how much in good faith he doubted the validity of the certification. This procedure is unfair to everyone; the union that wins, which frequently must wait for many months to exercise its rights; the union that loses, which has no appeal at all no matter how wrong the certification may be; *the employees, who also have no appeal*; and the employer, for whom an appeal involves grave risks. The bill permits any

person interested to appeal from a certification, as from a final order of the Board. [Emphasis added.]

But this provision was eliminated in conference. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 56-57, 1 Leg. Hist. 560-561. Senator Taft explained the rejection of the House proposal and the reenactment of the original Section 9 (d) as follows (93 Cong. Rec. 6444, 2 Leg. Hist. 1542):

Subsection 9 (d) of the conference agreement conforms to the Senate amendment. The House Bill contained a provision which would have permitted judicial review of certifications even before the entry of an unfair labor practice order. In receding on their insistence on this provision, the House yielded to the view of the Senate conferees that such provision would permit dilatory tactics in representation proceedings.

As summed up by the Second Circuit in *Fitzgerald v. Douds*, 167 F. 2d 714, 716: "Congress has dealt in section 9 (d) with reviews of certification and 'decertification,' and has provided therein the only relief it means to grant on that subject." Accordingly, at least absent a *substantial* constitutional question, which we show pp. 19-20, *infra*, is not presented here, the courts have declined to entertain the complaint of labor organizations or of employees that they have been injured by alleged improper action of the Board or its agents in conducting elections, defining appropriate units, and issuing certifications under Section 9 of the Act. *Millis v. Inland Empire District Coun-*

cil, 79 App. D. C. 214, 144 F. 2d 539 (C. A. D. C.), aff'd on other grounds (discussed *infra*), 325 U. S. 697; *Reilly v. Millis*, 79 App. D. C. 171, 144 F. 2d 259 (C. A. D. C.), cert. den., 325 U. S. 879; *Fitzgerald v. Douds*, 167 F. 2d 714 (C. A. 2); *Int'l Union, Local No. 148 v. Int'l Union, Local No. 2*, 173 F. 2d 557 (C. A. 8); *Madden v. Brotherhood*, 147 F. 2d 439 (C. A. 4); *White v. Herzog*, 80 F. Supp. 407 (D. D. C.); *Housewright v. Hull*, 104 F. Supp. 234 (D. Ohio); *Mechanics Educational Society v. Schaufler*, 103 F. Supp. 130 (D. Pa.); see also, *Switchmen's Union v. National Mediation Board*, 320 U. S. 297; cf. *Fay v. Douds*, 172 F. 2d 720 (C. A. 2).⁷

Particularly in point are this Court's decisions in *Reilly* and *Inland Empire*, *supra*. Both cases involved independent equity suits to set aside a Board election and certification, by parties—individual employees in *Reilly* as here, and a defeated union in *Inland Empire*—who could not otherwise obtain review through the procedures provided in Sections 9 (d) and 10 (e) and (f) of the Act. Moreover, in both cases, the claim was, as here, that the bargaining unit defined by the Board was arbitrary and capricious, thereby resulting in the certification of a union as the employees' representative which would have been defeated had the unit been properly defined. In both cases the District

⁷ Section 10 of the Administrative Procedure Act (5 U. S. C. 1009) does not enlarge the District Court's jurisdiction in this area, because it is expressly inapplicable where Congress has otherwise manifested the intent to preclude judicial review. See *Int'l Union v. Int'l Union*, 173 F. 2d 557, 559 (C. A. 8); *White v. Herzog*, 80 F. Supp. 407, 411 (D. D. C.); *Kirkland v. Atlantic Coast Line*, 83 App. D. C. 205, 167 F. 2d 529 (C. A. D. C.), cert. den., 335 U. S. 843.

Court dismissed the complaint, which action was sustained by this Court. As this Court stated in *Inland Empire*, pointing to the Supreme Court's decision in *Switchmen's Union*, 320 U. S. 297, holding that the District Court lacked power to review a similar certification of the National Mediation Board (79 App. D. C. at 214, 144 F. 2d at 539):

The National Labor Relations Act authorizes judicial review of the Board's certification if, but only if, the Board finds unfair labor practices and makes its certification the basis of an order with respect to such practices. §§ 9 (d), 10 (c). . . . We think the statutory review is exclusive.

The validity of the foregoing is not affected by the fact, relied on by appellants (Br. 39-41), that the Supreme Court, in affirming this Court's *Inland Empire* decision, found it unnecessary to decide the jurisdictional question because it first determined that, upon the facts presented, there was no showing that the Board had acted unlawfully, "whether by way of departure from statutory requirements or from those of due process of law" (325 U. S. at 700). The Supreme Court's failure to decide the question in effect leaves undisturbed, for the present at least, the considerations which prompted this and other Courts to hold that Congress intended to preclude direct court review of Board action in representation cases, which considerations have, indeed, been subsequently reinforced by the legislative history of the amended Act (pp. 14-15, *supra*).

Nor is a different conclusion indicated by the holding of this Court in *Farmer v. United Electrical*

Workers, 93 App. D. C. 178, 211 F. 2d 36, 39-40 (C. A. D. C.), cert. den., 347 U. S. 943, that the District Court had jurisdiction to determine whether the Board possessed statutory authority to inquire into the truth or falsity of non-Communist affidavits filed with it under the Act. This Court emphasized that its holding was limited to the situation there, which, unlike that here and in the cases cited above, entailed Board action wholly "preliminary" to a particular unfair labor practice or representation proceeding, and, in this Court's view, "plainly beyond the scope of [the Board's] statutory authority" (211 F. 2d at 40). In short, in *United Electrical*, the factor of avoiding a delay in representation proceedings, the basic reason for Congress' declination to permit direct judicial review thereof, was absent. Moreover, there the action taken was alleged to be wholly beyond the Board's statutory power, whereas here, since the Board admittedly has a broad discretion in determining appropriate units, appellants' complaint relates only to the *manner* in which this power was exercised in a particular case. Judicial authority has recognized that the considerations for permitting direct review in the former situation do not apply with equal force in the latter. Cf. *Stark v. Wickard*, 321 U. S. 288, and *Airline Dispatchers Assoc. v. Nat'l Mediation Board*, 89 App. D. C. 24, 189 F. 2d 685 (C. A. D. C.), with *Switchmen's Union v. Nat'l Mediation Board*, 320 U. S. 297.

Accordingly, the District Court properly dismissed the complaint herein for lack of jurisdiction over the subject matter.

II.

In any event, no claim warranting judicial relief is presented

Appellants' basic contention, as revealed by their complaint (J. A. 11A-13A), is that Board certification of the Union would deprive them of their right to make individual contracts of employment without due process, in that they would be forced to bargain through an agent which their votes, had they not been improperly blocked, could have defeated. Without regard to the scope of the certification actually issued by the Board in this case, this contention fails to present a substantial constitutional question, such as would vest a federal district with an independent jurisdiction in the face of the Act's exclusive review procedures ("Point I," *supra*).⁸ In the light of the Board's action, the absence of such a question is even more apparent. Appellants concede that "they have no cause of action unless a substantial loss was incurred by them as a result of the denial of due process" (Br. 28). Since the Board, in certifying the Union, found that Appellants DePratter, Mobley, Traina and Diaz were specifically excluded from the

⁸ Section 9 of the Act, which is clearly constitutional, contemplates that a representative selected in an election held pursuant to the provisions of the Act shall be the exclusive representative of all the employees in the unit. Moreover, an election may be valid for purposes of the Act even though not all of the employees in the unit have voted. See *N. L. R. B. v. Central Dispensary & Emergency Hospital*, 79 App. D. C. 274, 145 F. 2d 852, 854 (C. A. D. C.), cert. den., 324 U. S. 847. Accordingly, the question of whether the election herein was valid absent appellants' votes turns, not on the Constitution, but on whether the Board's powers under the Act would permit certification of the Union in these circumstances.

bargaining unit (p. 6, *supra*), their failure to vote has resulted in no loss to them. For, not being in the bargaining unit represented by the Union, they remain free to bargain individually with their employer concerning their working conditions even when doing production work.⁹

Nor is this conclusion altered by appellants' suggestion (Br. 30) that this freedom is illusory because the employer would not in fact contract with them for any better or different terms of employment than those negotiated between the employer and the Union covering employees in the unit. Such a speculative assertion of injury can hardly present a substantial constitutional issue. Moreover, even if appellants' contention ultimately proved to be true, there would be no constitutional issue for they would be in no different position from any other non-union employees working in a plant where part of their fellow employees are represented by a certified representative.

Accordingly, appellants' complaint reduces itself to an attack on the propriety of the Board's determination in excluding 4 of them from the bargaining unit found appropriate (see Br. 18-28, 30-32). This is not a constitutional question but a question of law, i. e., whether the Board's action exceeded its powers under the Act. As we now show, the action taken was valid and proper and did not constitute an abuse of the

⁹ With 4 of the appellants thus excluded, the question of whether Appellant Miller was improperly denied the right to vote becomes irrelevant, because her vote could not affect the outcome of the election.

broad discretion which Section 9 of the Act vests in the Board with respect to defining appropriate units and conducting representation elections.¹⁰

The election herein was conducted in accordance with the Board's consent election procedures which procedures were adopted early in the administration of the Act as a means of furthering the Congressional policy of expediting representation determinations. Under these procedures—which were specifically confirmed in Section 9 (c) (4) of the Act, as amended—the employer and the would be representative may, if they can reach an agreement which is approved by the Board or its Regional Director, dispense with extensive hearings on the question of the appropriate unit and other matters concerning the conduct of the election. The importance of the consent election in the administration of the Act is emphasized by the fact that in fiscal year 1954, 3,469 of the 4,813 representation elections conducted by the Board were consent or stipulated elections. *Nineteenth Annual Report of the National Labor Relations Board*, Appendix A, Table 11.

In keeping with the nature and purposes of the consent election procedure, the Board has accepted stipulated units, which, though appropriate under the Act's broad standards, are different from those which the Board itself may have defined had the proceeding been contested.¹¹ Similarly, although the parties are per-

¹⁰ See *Mueller Brass Co. v. N. L. R. B.*, 86 App. D. C. 153, 180 F. 2d 402, 404 (C. A. D. C.); *N. L. R. B. v. Waterman Steamship Corp.*, 309 U. S. 206, 226; *N. L. R. B. v. A. J. Tower Co.*, 329 U. S. 324, 330.

¹¹ For this reason, the cases cited at p. 18 of appellants' brief are inapposite.

mitted to file post-election challenges and objections, they may not thereby alter the terms of their original agreement. Accordingly, it is established Board policy to honor concessions made earlier in the proceeding and to reject post-election challenges to the unit based solely upon the fact that employees have been excluded, whether through inadvertence or design, who could have been included without rendering the unit inappropriate. *Stanley Aviation Corporation*, 112 NLRB No. 61, April 28, 1955; *Bachmann Worsted*, 109 NLRB 868, 870, n. 9; *Baird-Ward Printing Co., Inc.*, 108 NLRB 815. Here, as with the Board's rule that challenges to the eligibility of voters must be made prior to the actual casting of ballots, the "principle of majority rule . . . does not foreclose practical adjustments" (*N. L. R. B. v. A. J. Tower*, 329 U. S. at 331).

Thus, in the instant case, the Company and the Union, after a hearing had first been held on the question of appropriate unit (p. 2, *supra*), agreed to a unit of production and maintenance employees, excluding, *inter alia*, truck drivers and clericals. In so doing, the Board found that the parties specifically contemplated excluding Appellants DePratter, Moble, Traina, and Diaz. This conclusion, together with the Company's awareness that these employees may have performed some production work in addition to their clerical and truck driving duties, is amply supported by the evidence detailed in the Board's decision. It shows that, not only were the duties of some of these appellants discussed in the prior Board hearing, but, before executing the stipulation, the

Company's attorney discussed the matter with the Company's vice-president, advising him that under the stipulation the four employees would be excluded and ineligible to vote because of their job classifications (Appendix A, *infra*, pp. 28-30). Since the stipulated unit excluding these employees would not be inappropriate, notwithstanding that they may also have performed some production work (see cases cited p. 22, *supra*), the Board, following its consistent policy in consent election cases, properly honored the original concession of the parties and held that Appellants DePratter, Mobley, Traina and Diaz were excluded from the unit covered by the certification issued to the Union.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the District Court's order dismissing appellants' complaint should be sustained.

THEOPHIL C. KAMMHOLZ,
General Counsel,
 DAVID P. FINDLING,
Associate General Counsel,
 MARCEL MALLET-PREVOST,
Assistant General Counsel,
 NORTON J. COME,
 ROBERT G. JOHNSON,
Attorneys,
National Labor Relations Board,
Washington, D. C.

NOVEMBER 1955.

APPENDIX A

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 10-RC-2995

SHORELINE ENTERPRISES OF AMERICA AND SHORELINE
PACKING CORPORATION, EMPLOYER

AND

INTERNATIONAL UNION OF UNITED BREWERY, FLOUR,
CEREAL, SOFT DRINK AND DISTILLERY WORKERS OF
AMERICA, CIO, PETITIONER

DECISION AND CERTIFICATION OF REPRESENTATIVES

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act a hearing was held on March 3, 1955, before Allen Sinsheimer, Jr., hearing officer. Thereafter, while this matter was pending before the Board for decision, the parties to this proceeding entered into a Stipulation for Certification upon Consent Election on March 21, 1955, which was approved by the Regional Director for the Tenth Region of the National Labor Relations Board on March 25, 1955. Pursuant to the Stipulation an election by secret ballot was conducted on April 4 and April 5, 1955, under the supervision of the Regional Director. Following the election, the parties were furnished a Tally of Ballots which shows that of the 114 ballots cast, 58 were cast for the Petitioner, 55 were cast against the Petitioner and one was challenged.

On April 11, 1955, the Employer filed timely objections to conduct affecting the results of the election, and the Petitioner filed a Brief in Reply to Employer's Objections to Election. In accordance with the Rules and Regulations of the Board, the Regional Director conducted an investigation and on May 16, 1955, issued and served upon the parties his Report on Election, Objections to Election and Recommendations to the Board, in which he found the objections did not raise substantial or material issues of conduct affecting the results of the election and recommended that the objections be overruled and the Petitioner be certified as the exclusive bargaining representative. On May 25 and 26, 1955, employees DePratter, Traina, Mobley and Diaz filed a Motion to Intervene and Exceptions to the Regional Director's Report.¹ On June 7, 1955, the Employer filed exceptions to the Regional Director's Report, requesting that the election be set aside or that a hearing be directed on the issues raised by its objections. On June 7, 1955, the Employer filed with the Board various applications to take deposition and for subpoenas to enable the Employer to develop evidence in support of its objections. The Petitioner timely filed briefs in opposition to these applications and in support of the Regional Director's Report on Objections.

¹ While it is not the Board's usual practice to permit the intervention of individual employees who do not claim to represent any employees for the purpose of collective bargaining, we shall permit these employees to intervene for the limited purpose of entering exceptions to that part of the Regional Director's Report on Objections which relates to their nonparticipation in the election. However, as their contentions have been fully presented and discussed by the Employer, we find it unnecessary to consider them separately. See *Belmont Radio Corporation*, 83 NLRB 45, at 46; *Western Electric Company, Incorporated*, 98 NLRB, at 1019. Cf. *Westinghouse Electric Corporation*, 78 NLRB 315; *Alaska Salmon Industry, Inc.*, 82 NLRB 1395.

FINDINGS OF FACT

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

4. The following employees employed by the Employer in its shrimp processing plant at Tampa, Florida, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9 (b) of the Act: All production and maintenance employees including refrigeration engineers; excluding truck drivers, all office employees, all clerical employees, professional employees, guards, watchmen, and all supervisors as defined in the Act.²

The Employer's first objection for our consideration relates to a number of alleged coercive statements made to employees before the election. We agree with the Regional Director that those statements which were made before the execution of the stipulation for Certification upon Consent Election cannot, in accordance with established Board policy, be considered as interference with the election.³ The investigation reveals that five statements may have been made after the execution of the agreement. Three of these statements—to the effect that an employee "would be sorry" if he did not support the Petitioner or that employees and their possessions would be sub-

² The unit appears as provided in the Stipulation for Certification upon Consent Election executed by the parties.

³ *F. W. Woolworth Co.*, 109 NLRB 1446.

ject to physical harm in the event of a strike—were made by union adherents who were not shown to be acting as agents of Petitioner. Like the Regional Director, we find these alleged incidents not to be of such a serious character or so proximate in time to the election as to warrant finding them interference with the election even though they could not be attributed to a party to this proceeding.⁴ The two remaining statements were allegedly made by two of Petitioner's committee members who allegedly threatened employees with economic reprisals if they did not support Petitioner. Without deciding the question of agency this allegation raises, we find that such alleged threats, the effectuation of which would have required the acquiescence of the Employer, were effectively neutralized by the Employer's contrary assurances made before the election in a speech to the employees.⁵ And in any event these statements were too isolated to have interfered with the election.⁶ Finally, we find no merit in the Employer's miscellaneous objections concerning coercive rumors attributable to persons unknown,⁷ the manner in which Petitioner secured its showing of representative interest⁸ and a Board agent's alleged statement to employee Mobley, who we hereinafter find was not entitled to participate in the election, that her ballot would not be counted.⁹

⁴ See *Bridgeport Castings Company*, 109 NLRB 749, at 754, and cases cited therein.

⁵ *Bender Playground Equipment, Inc.*, 97 NLRB 1561, at 1562.

⁶ *Goodyear Clearwater Mill No. 2*, 109 NLRB 1017, at 1019-1020; *Western Table Company*, 10 NLRB 17.

⁷ *E. H. Blum*, 111 NLRB 110 at 112.

⁸ *The Colorado Milling and Elevator Company*, 108 NLRB 1014, at 1015.

⁹ Compare *Animal Trap Company of America*, 107 NLRB 1195.

Assuming that the Petitioner's election observers were paid organizers for Petitioner,¹⁰ as alleged in the Employer's second objection, we find this fact not to have disqualified them from acting as observers for Petitioner.¹¹ They were "non-supervisory employees of the Employer" and were therefore qualified, under the conditions provided in the election agreement, to act as election observers. Accordingly, we find no merit in this objection.

Employees DePratter, Mobley, Traina and Diaz, and the Employer in its third objection, contend that these employees were improperly denied the right to participate in the election. As their ballots might have affected the result of the election, these employees and the Employer contend that the election was thereby invalidated.

In substance, they allege: that at the time he signed the election agreement, the Employer's attorney was ignorant of the fact that these employees performed some production work, in addition to their clerical or truck driving duties, thereby qualifying them for inclusion in the unit; that the Board's field examiner informed the Employer's attorney that "he was satisfied" these employees were not entitled to vote; that relying entirely upon this allegedly erroneous and improper assurance, the Employer's attorney agreed that these employees not be permitted to vote.

The Employer submitted with its Exceptions to the Regional Director's Report on Objections an affidavit of its attorney in which the attorney recounts the

¹⁰ As we find it unnecessary to determine whether Petitioner's election observers were in fact organizers in the employ of Petitioner, we hereby deny the Employer's various applications to take depositions and for subpoenas for the purpose of developing evidence regarding this allegation.

¹¹ *Dallas City Packing Company*, 110 NLRB 8; *N. L. R. B. v. Huntsville Mfg. Co.*, 203 F. 2d 430 (C. A. 5).

events which preceded the execution of the consent election agreement at the conference held for that purpose. Therein the Employer's attorney states that he "was unaware at the time that these employees also performed production work" but he admits (1) that before he signed the election agreement he called the Employer's vice-president and "stated to him over the 'phone that if we agreed to the unit requested by petitioner, excluding clericals and truck drivers, that *the four employees in question would be unable to vote* because that was their job classification." (Emphasis added), (2) that he then consented to the exclusion of these employees, and (3) that only *after* the execution of the election agreement did the field examiner insist that the names of these employees be stricken from the eligibility list and assure the Employer's attorney, in response to his question, that "he was satisfied these employees were excluded from the unit and ineligible to vote within the unit agreed to."¹²

This affidavit¹³ clearly reveals that in signing the election agreement excluding "truck drivers" and "all office employees and all clerical employees," the Employer's attorney and the Petitioner's representative understood and intended that the four employees in question were thereby excluded from the unit and "would be unable to vote because that was their job

¹² The Regional Director, in his Report on Objections, states that both the field examiner and Petitioner's representative deny the allegation that the field examiner made any assurances that the four employees were not entitled to vote.

¹³ In another affidavit, submitted by Intervenors as an exhibit attached to their exceptions, the Employer's attorney stated that "Although I believed that by agreeing to the unit proposed by the Petitioner it would result in the elimination of the parties in question, the entire discussion was directed toward agreeing to a unit."

classification.”¹⁴ Accordingly, we find that the field examiner acted entirely properly in insisting, *after* the execution of the agreement excluding these employees from the unit, that their names be stricken from the eligibility list.

Nor would we vitiate this election were it established that the Employer's attorney, as he alleges, was at the time he signed the election agreement excluding these employees from the unit ignorant of the fact that they engaged in some production work. In the recent *Stanley Aviation Corporation* case¹⁵ the petitioner stipulated to the exclusion of certain employees. But in seeking to overrule challenges to their ballots the petitioner asked that a hearing be held to redetermine their unit placement, alleging that it had inadvertently entered into the stipulation because it was not fully acquainted with the duties of these employees: The Board ruled that it would be contrary to good administrative practice to reopen the record at the postelection stage of the proceeding to permit such a redetermination, citing its “well established policy of honoring concessions made in the interest of expeditious handling of representation cases in general.” At the hearing in the instant case the Employer's attorney had ample opportunity to inquire as to the duties of these employees. In fact, in his presence the Employer's plant manager twice testified, in response to questions put by the hearing

¹⁴ The record of the hearing held in this proceeding also supports this conclusion. At that hearing employees DePratter, Mobley, and Traina were referred to as “plant clericals” without objection from the Employer's attorney, and it appears from the record that they are the only employees that could have been so characterized. The plant manager testified that Diaz was the Employer's only truck driver and that “his time is almost entirely devoted to driving the truck.”

¹⁵ 112 NLRB No. 61.

officer, that one of the employees, Traina, participates in the work of the packaging room in addition to performing duties as a plant clerical employee. And before signing the election agreement, the Employer's attorney, by his own admission, called the Employer's vice-president and discussed with him the exclusion of these employees. Under these circumstances and for the reasons stated in *Stanley Aviation*, we find it immaterial that when he signed the election agreement the Employer's attorney may have been unaware of the production duties of the four disputed employees.¹⁶

Accordingly, we find that the Employer's and Intervenor's objections to the election do not raise substantial or material issues with respect to the conduct or the results of the election, and they are hereby overruled.

Petitioner having been designated by a majority of the employees in the bargaining unit, we shall certify it as bargaining representative in that unit.

CERTIFICATION OF REPRESENTATIVES

It is hereby certified that International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, CIO has been selected by a majority of the employees of Shoreline Enterprises of America and Shoreline Packing Corporation in the appropriate unit described in paragraph numbered 4, above, and that pursuant to Section 9 (a) of the Act, the said labor organization is the exclusive representative of all the employees in such

¹⁶ Having found that the four employees in question were excluded from the unit, and were therefore ineligible to participate in the election, we find it unnecessary to determine the issue raised by the Employer's contention that these employees were improperly denied an opportunity to cast ballots in the election.

unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment.

Dated, Washington, D. C., October 26, 1955.

PHILIP RAY RODGERS,
Acting Chairman.

ABE MURDOCK,
Member.

IVAR H. PETERSON,
Member.

BOYD LEEDOM,
Member.

(SEAL)

NATIONAL LABOR RELATIONS BOARD.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2)

decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of repre-

sensation affecting commerce exists shall provide for an appropriate hearing upon due notice.

Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) af-

fecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of

fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

No. 12874

REPLY BRIEF FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

APRIL TERM, 1955

RUTH DEPRATTER, VERA MOBLEY, BILLIE TRAINA,
AUDREY MILLER, AND JOE DIAZ,
Appellants.

v.

GUY FARMER, ABE MURDOCK, IVAR H. PETERSON, PHILIP
RAY RODGERS, and BOYD STEWART LEEDOM, individually
and as chairman and members of the National Labor
Relations Board,
Appellees.

Appeal from an Order of the United States District Court
for the District of Columbia

CODY FOWLER
Citizens Building
Tampa, Florida

DAVID C. BASTIAN
Colorado Building
Washington, D. C.
Attorneys for Appellants

Of Counsel:

FOWLER, WHITE, GILLEN, YANCEY and HUMKEY
1002 Citizens Building
Tampa 2, Florida

DRURY, LYNHAM & POWELL
312 Colorado Building
Washington, D. C.

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Appeal from an Order of the United States District Court
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REPLY BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

As the Court will note, this is an appeal from a District Court Decision dismissing the complaint of certain individual employees who were allegedly wrongfully excluded from participating in an election held for the purpose of selecting a bargaining agent. At the time this action was filed, the bargaining agent had not been certified by the National Labor Relations Board (hereinafter sometimes referred to as the "Board") of which appellees are the component members.

On October 26, 1955, the Board issued its decision certifying the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.I.O. (hereinafter sometimes referred to as the "Union"), as the exclusive collective bargaining agent for a unit of "all production and maintenance employees, including refrigeration engineers, excluding truck drivers and excluding all office employees and all clerical employees, professional employees, guards and/or watchmen and supervisors as defined in the Act" at the plant of Shoreline Enterprises of America (hereinafter sometimes referred to as the "Employer").

The Board made token reference in a footnote to the appellants', DePratter, Mobley, Traina and Diaz, Motion to Intervene, in theory granting this Motion, saying that "their contentions have been fully presented and discussed by the Employer, we find it unnecessary to consider them separately." The Board concluded that the Employer's Exceptions raised no substantial or material issues.

In regard to the exception that appellants DePratter, Mobley, Traina and Diaz were improperly denied the right to vote, the Board found that the Employer and the Union "understood and intended that the four employees in question were thereby excluded from the unit." Since the four appellants were excluded from the unit, they did not have the right to vote in the election. In effect, the Board held that the Employer was estopped to raise this objection since he agreed to the unit and believed, even though it was a mistaken belief, that the unit as agreed to properly excluded these employees.

SUMMARY OF ARGUMENT

I. Appellants have suffered a substantial loss warranting judicial relief.

Since appellants' votes would have altered the results of the election, the denial of their right to vote resulted in the selection of a bargaining agent that would not have otherwise been selected, contrary to the desires of the majority of the employees voting or who would have voted except for the illegal action. This deprived appellants, as well as the other fifty-five employees who voted "no", of their right to bargain individually with their Employer or to select a more appropriate bargaining agent, without due process of law. This is clearly a substantial loss and the deprivation of appellants' constitutional rights.

Although the Board found that appellants DePratter, Mobley, Traina and Diaz were excluded from the unit found appropriate, thereby leaving them technically free to bargain with their Employer, this would not affect the appellants' loss for (1) appellants DePratter, Mobley, Traina and Diaz would still have to work under conditions set by a bargaining agent contrary to their desires, since they work within the bargaining unit the majority of their time; and (2) appellant Miller and the other fifty-five employees who voted "no" would have to work under the conditions set by a bargaining agent contrary to their desires and who would not have been selected except for the illegal exclusion of DePratter, Mobley, Traina and Diaz.

It is therefore seen that the question of whether or not the constitutional rights of appellants have been infringed depends upon whether or not the denial of the right to vote to appellants DePratter, Mobley, Traina and Diaz was proper. This, in turn, depends upon whether or not DePratter, Mobley, Traina and Diaz were

included within the bargaining unit agreed to by the Employer and the Union and found appropriate by the Board.

The law is undisputed—if employees work regularly a substantial amount of time within the unit, they are within the unit and eligible to vote. It is also undisputed that the appellants DePratter, Mobley, Traina and Diaz work regularly a substantial amount of time within the unit. They are therefore clearly within the unit and eligible to vote. *This is conclusive of the question.*

The Board in its decision and the appellees in their Brief, in attempting to circumvent the law of the preceding paragraph, have argued:

- (1) by implication, that the Employer and the Union set up their own system of classification or category for determining eligibility for inclusion in the unit.
- (2) that employees can be excluded from a unit and therefore from voting in a unit they are otherwise entitled to be included in, simply on the grounds that the Union and the Employer “understood and intended” to exclude them.

In answer to the first contention, the appellants show that:

- (1) There is not a scintilla of evidence to show that the parties agreed to their own system of classification or category for determining eligibility for inclusion in the unit or for voting;
- (2) All the evidence shows that the parties did not so agree;
- (3) The approval of such an agreement is beyond the authority of the National Labor Relations Board; and

- (4) At any rate, the Board in its decision did not find that the Employer and the Union so agreed.

In answer to the second contention of the Board and the appellees, the appellants show that:

- (1) There is no Board precedent or authority to substantiate the exclusion of employees otherwise included within the unit and eligible to vote solely on the basis of what the Union and the Employer "understood and intended";
- (2) The Board's finding that the Union and the Employer "understood and intended" to exclude the four employees is contrary to the National Labor Relations Act, as amended, (hereinafter sometimes referred to as the "Act") and is in excess of their authority under the Act;
- (3) At any rate, the Board's finding that the Union and the Employer "understood and intended" to exclude DePratter, Mobley, Traina and Diaz from the suit is not supported by a scintilla of evidence; and
- (4) All the evidence shows that the parties did not intend to exclude DePratter, Mobley, Traina and Diaz from the unit.

Although the Board in its decision and the appellees in their Brief do not directly so state, it is clear that the doctrine of estoppel was applied in this case. The language of the Board and of the appellees ("understood and intended"; "honoring concessions"; etc.) shows clearly that the decision was based upon grounds of estoppel even though there is no basis upon which the doctrine of estoppel could be applied to the appellants.

To permit an employer and a union to exclude otherwise eligible employees from the unit on the basis of what the employer and the union "understood and in-

tended", is completely contrary to the National Labor Relations Act, as amended. This is emphasized by the lack of even one decision of the Board in support of such a principle.

This doctrine, if adopted, would render Section 9 of the National Labor Relations Act unconstitutional. It is so completely contrary to the Act that its effect would be to completely nullify the intent and purposes for which the Act was passed. On authority of this decision an unscrupulous employer and a union could now remove otherwise eligible employees from their unit and prevent them from voting solely on the grounds that they "understood and intended" to exclude these employees from the bargaining unit, when the exclusion is for the sole purpose of excluding eligible employees who would vote against the union in a forthcoming election. This would assure that the particular union desired by the employer (not by the employees) would win.

These unscrupulous parties, once the union is certified, could then set the wages to suit the employer, and the dues, which would be automatically checked off, to suit the union. No real representation of the employees would exist.

ARGUMENT

Due to the fact that the Board's decision had not been issued at the time Appellants' Brief was prepared and because Appellees' Brief is almost entirely devoted to explaining and supporting this decision, it is necessary that a Reply Brief be filed.¹ However, this brief will be

¹ The record contained in the joint appendix will be referred to as Appendix. The Board decision which is contained in Appendix A to Appellees' Brief will be referred to as Appendix A. The affidavits referred to and relied on by the Board in rendering its decision are contained in Appendix X at the end of this Brief.

limited to a discussion of the first question as set out in Appellants' Main Brief with particular emphasis on the effect of the Board's decision.

I.

Appellants Have Suffered a Substantial Loss Warranting Judicial Relief

Since appellants' votes would have altered the results of the election (Appellants' Brief, p. 29), the illegal and arbitrary action of the Board in preventing the appellants DePratter, Mobley, Traina and Diaz from voting resulted in the certification of a union which was contrary to their desires and which would not have been otherwise selected. This, without due process of law, deprived the appellants, as well as the other fifty-five employees who voted "no," of their constitutional right to bargain individually with their Employer or to select a more appropriate bargaining agent. This is clearly a substantial loss and a deprivation of appellants' constitutional rights (Appellants' Brief, pp. 18-32).

Since the Board found that appellants DePratter, Mobley, Traina and Diaz were excluded from the unit found appropriate, appellees argue that the action of appellees in improperly preventing them from voting could not result in any loss to appellants. The contention is that since these four appellants were not in the bargaining unit represented by the Union, they remain free to bargain individually with their Employer.

This contention, however, fails to take into consideration the fact that DePratter, Mobley, Traina and Diaz would still work within the unit a majority of their time and that during that time they would be working under conditions set by a bargaining agent contrary to their desires. This fact is not altered by appellees' assertion

(Appellees' Brief, p. 20) that this is mere speculation. Although appellants contend that this fact is not speculative and involves a substantial loss to them, these facts, at the least, present a constitutional question which is not transparently frivolous.

This contention also fails to take into consideration that the illegal exclusion caused substantial loss to and the infringement of the constitutional rights of appellant Miller and the other fifty-five employees who voted not to be represented by the Brewery Workers Union (Appellants' Brief, pp. 30-31). The appellees have neglected to answer how this loss is avoided by the decision. It cannot be answered.

The action of the Board clearly resulted in the loss of a substantial constitutional right (Appellants' Brief, pp. 28-32) if the exclusion of DePratter, Mobley, Traina and Diaz from the unit was improper. Let us then consider whether this exclusion was improper.

The loss to appellants and the other fifty-five employees who voted "no" in the election depends upon whether appellants DePratter, Mobley, Traina and Diaz were entitled to participate in the election. The participation by these four appellants in the election in turn depends upon whether they were included within the bargaining unit agreed to by the Employer and the Union and found appropriate by the Board. In order to clearly show that appropriateness of the unit is not the question as appellees suggest, we must digress briefly.

The Regional Director in his Report recommended to the Board that it find that the unit agreed to by the Employer and the Union excluded part-time employees and that DePratter, Mobley, Traina and Diaz were part-time employees (App. 60A-62A). In support of his conclusion that the Board should find this particular unit appropriate, the Regional Director cited *Bachmann Ux.*

bridge Worsted Corporation, 109 NLRB 868, 870, n. 9. This is also cited in Appellees' Brief (p. 22). A reading of this decision does not lend support to the Regional Director's conclusion or the statement for which it is cited by the Appellees. In the *Bachmann Uxbridge Worsted* case, the Board found that the appropriate unit was—

“all production and maintenance employees at the Employer's Uxbridge, Massachusetts, plant, including the department clerical workers, the boiler room employees, the perchers in the weave room, the truck drivers in the trucking department and all other employees in the shipping and trucking departments, but excluding office workers, main office clerical workers, chemists, draftsmen, research engineers, salesmen, technical engineers (including time-study workers), laboratory employees, designers, assistant designers, *part-time*” and temporary employees, salaried employees, employees at the Uxbridge Inn, watchmen, guards, executives, managers, superintendents, assistant superintendents, foremen, assistant foremen, second hands, and all other supervisors as defined in the Act.” (Emphasis ours).

The footnote referred to above by both the appellees and the Regional Director reads as follows:

“9. The parties agree that part-time employees are those who are customarily employed on a regular basis for no more than 20 hours a week. In accordance with the Board's recently adopted policy, regular part-time employees will be excluded from a unit where the parties have stipulated for their exclusion. To that extent, we shall no longer follow the previous Board policy as set forth in *Essex-Graham Company*, 107 NLRB No. 292.”

In the present proceedings the unit agreed to by the Union and the Employer and set out in the signed stipulation for consent election fails to mention “part-time employees”. The Board must have considered the contentions raised by appellants (Appellants' Brief, pp. 18-

21) since it rejected the Regional Director's recommendation in this regard.

The Board in its decision (Appendix A, p. 26) found that the unit agreed to by the Employer and the Union and set out in the written stipulation for consent election (Appendix p. 24A) as an appropriate unit, was:

"All production and maintenance employees, including refrigeration engineers, excluding truck drivers and excluding all office employees and all clerical employees, professional employees, guards and/or watchmen and supervisors as defined in the Act."

The appellants do not, as appellees contend (Appellees' Brief, pp. 20-23) contest the appropriateness of the unit agreed to by the Employer and the Union and found to be appropriate by the Board. The question is not whether the unit is appropriate, but whether appellants DePratter, Mobley, Traina and Diaz are within the unit.² The appellants have not at any time contended that the aforesaid unit set out in the written stipulation was inappropriate. They have, in fact, actively and definitely supported the conclusion that this unit was appropriate (Appellants' Brief, pp. 18-21). The appellants have not attempted to alter or change the unit set out, and vigorously protested the Regional Director's arbitrary enlargement of the exclusions to exclude "part-time employees" when that exclusion was not set out in the written stipulation (Appellants' Brief, pp. 18-21).

However, the fact that appellants do not contest the appropriateness of the aforesaid unit does not mean that they concede that DePratter, Mobley, Traina and Diaz are excluded from this unit. This is an entirely different question.

² For this reason, the case cited at p. 21 of the Appellees' Brief is in apposite.

In innumerable decisions the Board has held that employees who work regularly a substantial amount of time within the unit are included within that unit and entitled to vote regardless of their other jobs or duties. (Appellants' Brief p. 18). *The fact that these employees regularly worked a substantial amount³ of time within the unit, and the law that employees who work regularly a substantial amount of time within the unit are within the unit, and entitled to vote, are beyond question and must stand undisputed.* The appellees believe this is conclusive of the question. However, both the Board in its decision and the appellees in their Brief neglect to mention this fact and law.

The Board in its decision and the appellees in their Brief have found that DePratter, Mobley, Traina and Diaz were not within the unit and were therefore not entitled to vote. Although appellants believe that this contention is disposed of in the preceding paragraph, they will show that the remaining contentions of the Board and the appellees are equally without merit.

³ Although appellees in their Brief (pp. 22-23) and the Board in its decision (Appendix A, pp. 28, 30) use the word "some", the fact is conceded that the work is regular and substantial. The employer, with his objections to the election, submitted affidavits of the appellants DePratter, Mobley, Traina and Diaz which showed that they regularly worked a substantial amount of time within the unit (Appendix 52 A). The transcript contains affidavits of the appellants substantially similar to the ones submitted by the employer with his objections and in which the work of appellants is set out and it is shown that they regularly worked a substantial amount of time within the unit. (Tr. 67, 71, 75, 79, 82). Since the Board made no investigation as to the extent of production work performed by appellants (Appendix 52 A n. 15) it must be presumed, for the purposes of the Board decision, that appellants regularly worked a substantial amount of time within the unit. In their sworn complaint appellants alleged that they regularly worked a substantial amount of time within the unit (Appendix 8 A). This fact is undenied by appellees. Accordingly, on this appeal this fact must be taken as true.

The appellees in their brief (p. 22) cite *Baird-Ward Printing Co., Inc.*, 180 NLRB 815, in support of the statement that

"it is established Board policy to honor concessions made earlier in the proceedings and to reject post-election challenges to the unit based solely upon the fact that employees have been excluded, whether through inadvertence or design, who could have been included without rendering the unit inappropriate."

The *Baird-Ward* case does not support this statement. In that case the parties had agreed that temporary employees were those who had been hired on a temporary basis and who could only become permanent in the event of a permanent opening for which the temporary employee was rehired. Although the Board found that the employee in question was eligible to vote under Board standards, the Board held that the employer and the union had agreed to a classification which excluded this employee from the unit and found that he was therefore ineligible to vote. In other words, the Board permitted the parties in the *Baird-Ward* case to agree to a system of classification which was different from the Board's normal unit inclusions or exclusions (regularly working a substantial amount of time within the unit) and held the parties to their agreement without consideration of the excluded employee's right.⁴

The *Baird-Ward* case illustrates one method by which the appellants DePratter, Mobley, Traina and Diaz could have been excluded from the unit by the Employer and the Union under Board precedent.

⁴ Although the appellants refer to this case, this not to be taken as an admission or approval of the case. Quite to the contrary, the appellants are of the opinion that as to the excluded employee the Board acted beyond its powers in the *Baird-Ward* case.

In the Board Decision, in the present case (Appendix A), the Board states:

"This affidavit clearly⁵ reveals that in signing the election agreement excluding 'truck drivers' and 'all office employees and all clerical employees,' the Employer's attorney and the Petitioner's representative understood and intended that the four employees in question were thereby excluded from the unit and "would be unable to vote because that was their *job classification*.¹⁴"⁶ (Our emphasis) (Appendix A, pp. 29, 30).

Footnote 14 of the Board's decision reads as follows:

"¹⁴ The record of the hearing held in this proceeding also supports this conclusion. At that hearing employees DePratter, Mobley, and Traina were referred to as "plant clericals" without objection from the Employer's attorney, and it appears from the record that they are the only employees that could have been so characterized. The plant manager testified that Diaz was the Employer's only truck driver and that 'his time is almost entirely devoted to driving the truck.'"⁷ (Appendix A, p. 30).

It would appear from this that the Board was attempting to find, in accordance with the *Baird-Ward* case,

⁵ Appellants presume that the word "clearly" is used loosely by the Board since only a contrary intention can possibly be received from this affidavit.

⁶ The appellees in their Brief also use the words "job classification" on p. 23.

⁷ The Board neglects to mention that there was no reason for Employer's attorney to inquire into the duties of these employees at the hearing. At that time the Union sought a unit composed of "all production and maintenance employees." This would include plant clericals and truck drivers. It only became important to determine the production duties of the plant clericals and the truck driver when the Union sought to exclude them. Until that time they would be included within the unit sought by the Union regardless of their duties. The Union did not seek to exclude plant clericals and the truck driver until after the hearing.

that the Employer and the Union had agreed to a system of classification which would exclude these employees. However, the Board failed to cite this case in support of its decision. The reason the Board failed to rely upon the doctrine of the *Baird-Ward* case in its present decision, was because there was absolutely no evidence to support such a conclusion.^{*} The fact of the matter was that all the evidence pointed to the contrary, as is revealed by the Employer's attorney's affidavit which was attached to the Employer's Exceptions, and by a second affidavit of the Employer's attorney which was attached to the Exceptions filed by DePratter, Mobley, Traina and Diaz, both of which are cited by the Board to support their decision. The applicable parts of these affidavits read as follows:

"There was no agreement arrived at this conference as to certain standards, definitions, systems of classifications or understandings for determination of employees' eligibility to be within the unit or to vote in the election held on April 4 and 5, 1955. There was no agreement intended nor was an agreement entered into to exclude part-time employees." (Appendix X, pp. 28, 29).

"At the conference on March 21, 1955, when the Election Agreement was entered into, there was no discussion of part-time employees. There was no intention on my part to exclude part-time employees. We did not enter into any agreement to exclude part-time employees or dual employees. We did not agree to certain standards, definitions, systems of classification, or understanding for determining eligibility." (Appendix X, p. 35).

Since these affidavits remain uncontroverted by any evidence, the Board was precluded from relying upon the *Baird-Ward* doctrine. At any rate, the Board did not rely upon the *Baird-Ward* case and did not find that the

^{*} The Regional Director's Report (Appendix, p. 38A) does not contain one iota of evidence in support of such a conclusion.

Employer and the Union had agreed to any system of classification for determining eligibility contrary or different from the Board's system of classification for determining eligibility.⁹

The Board's decision excluding DePratter, Mobley, Traina and Diaz from the unit, and the appellees' contention that these four employees were excluded from the unit were based solely upon the Board's finding that the Union and the Employer "understood and intended that the four employees in question" were excluded from the unit. In support of this contention of the Board (Appendix A, pp. 30, 31) and the appellees and in support of appellees' statement that

"it is established Board policy to honor concessions made earlier in the proceeding and to reject post-election challenges to the unit based solely upon the fact that employees have been excluded, whether through inadvertance or design, who could have been included without rendering the unit inappropriate."

(Appellees' Brief, p. 22), the case of *Stanley Aviation Corporation*, 112 NLRB No. 61 is cited. That case fails to support either the Board's determination or the appellees' statement.¹⁰

⁹ The Election Agreement provided in part: "Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the board." (Appendix 22A) This would prevent the parties from agreeing to any system of classification or category to determine eligibility contrary to the "customary procedures and policies of the Board."

¹⁰ This is the last of three Board decisions which appellees cite in support of their above quoted proposition, none of which support the proposition, nor does the combination of the three Board decisions support the proposition. Of course in all three of these cases, contrary to the case here, the employees themselves had raised no objection. The only parties concerned were the Employer and the union who could be considered to be estopped by their action from contesting the Board's determination.

In the *Stanley Aviation* case, the Board had found a unit appropriate which excluded from the unit the category of "Quality Control Department" as stipulated by the two unions seeking certification and the employer. In accordance with the decision an election was held and one of the unions won. After the election, the employer and the losing union contended that the unit should not have excluded the Quality Control Department. The employer and the losing union requested the Board to change the unit so that the Quality Control Department was not excluded. The losing union's contention was that it did not know at the time it stipulated to exclude the Quality Control Department from the unit, what duties were performed by the employees in this department, and, if it had been aware of these duties, it would not have agreed to the exclusion of the Quality Control Department from the unit. The Board held that it had the

"well established policy of honoring concessions made in the interest of expeditious handling of representation cases in general. We therefore consider it to be contrary to good administrative practice to reopen the record at this post-election stage of the proceeding to afford the parties an opportunity to be heard on the question of the inclusion of the Quality Control Department employees in the unit."

The *Stanley Aviation* case is clearly not applicable to the situation here. In that case the entire question was concerned with *the unit*, not whether certain employees are *within the unit*. The losing union and the employer in the *Stanley Aviation* case requested the Board to change the unit stipulated by the parties and found to be appropriate by the Board so as to include the Quality Control Department.¹¹ The losing union and the employer

¹¹ It should be noted that the entire argument of the appellees in their Brief (pp. 19-23) is that the appellants are seeking to have the Board change the unit, or are attacking the Board's determination as to the appropriate unit. As has been pointed

in the *Stanley Aviation* case did not request the Board to determine whether certain employees, regardless of their title, were within the particular unit, as is the case at bar. It can easily be seen that if the Board permitted any of the parties to change the unit (assuming it is appropriate) to an entirely different unit after an election, no election would ever be final, since so many different units could be appropriate.¹²

That the exclusion by the Board in the present case is contrary to the National Labor Relations Act is emphasized by the lack of any supporting authority in its own decisions. The effect of this decision would permit the collusion of an employer and a union to completely abrogate the Act.

We believe that the Board in the *Baird-Ward* decision exceeded its authority under the Act, although it did permit the employees to be excluded *only* by classification or category.¹³ In the present Board decision, the Board

out continuously throughout this Reply Brief, the appellants do not seek to enlarge the unit found appropriate, nor do they challenge the appropriateness of the unit, they contend that DePratter, Mobley, Traina and Diaz are within this unit.

¹² This is not to be construed that appellants are in agreement with the *Stanley Aviation* decision, but is only used to illustrate the entirely different problem presented by that case and the present Board decision. There would appear that under certain circumstances a unit change should be permitted, where for example one of the parties was misled by a Board agent and the other party into agreeing to a unit. In fact, the appellants' present contention is that the Employer's attorney was improperly misled by the Board agent and the Union into agreeing to the removal of DePratter, Mobley, Traina and Diaz from the eligibility list. The Board's decision does not make a contrary finding, so for the purposes of this appeal, this fact must be taken as true.

¹³ In that case the Board permitted the exclusion of *all* employees within a certain classification agreed to by the union and the employer, but did not permit the exclusion of individual employees within the classification while permitting the inclusion of other individual employees in the same classification.

permitted the Employer and the Union to exclude employees who would otherwise be included in the unit without the necessity of excluding an entire classification or category. The Board, by this decision, permitted the Employer and the Union to remove from the eligibility list individual employees without regard to their classification and who would otherwise have been included within the unit and were within the classification of employees included in the unit and permitted to vote.¹⁴ It is a well recognized principle that the Board does not eliminate or permit the elimination of individual employees within a category, but instead eliminates the entire category. Some employees within a category or classification cannot be permitted to vote and others in the same category or classification be denied the right to vote. (Appellants' Brief, p. 20).

Under the present Board decision, unscrupulous unions and employers can join together and completely defeat the purposes of the National Labor Relations Act, which requires that the selection of the bargaining agent shall be by a majority of the employees voting in a unit appropriate for the purpose of collective bargaining. Unscrupulous persons, by authority of this decision, can thus remove otherwise eligible employees from their unit

¹⁴ The fact that these employees (DePratter, Mobley, Traina and Diaz) were removed from the eligibility list on the mistaken belief that they were excluded from the agreed unit did not affect their eligibility to vote, since such is the ordinary procedure when the parties do not believe an employee is within the unit. This could not be considered a *specific* exclusion, even if such was possible, of employees otherwise eligible to vote. (Appellants' Brief, p. 20). The election agreement also provided in part: "At a date fixed by the Regional Director, the Employer will furnish to the Regional Director an accurate list of all the eligible voters together with a *list of the employees, if any, specifically excluded from eligibility.*" (Our emphasis) (Appendix 23A). There was no list furnished by the Employer or requested by the Regional Director listing the employees "specifically excluded."

and prevent them from voting on the grounds that the employer and the union "understood and intended" to exclude them from the bargaining unit, even though the exclusion was only because the excluded employees would vote against the union in the forthcoming election.¹⁵ This would assure that the particular union desired by the employer (not by the employees) would win.

Thus, an unscrupulous employer and union, once the union is certified, can set the wages to suit the employer, and the dues, which would be automatically checked off to suit the union. No real representation of the employees would exist.

There is no doubt that Section 9 as interpreted by the present decision would be unconstitutional. Such an interpretation permits the employer and the union to dictate who will be the bargaining agent of the employees, even though that agent is contrary to their desires. The employees are thereby deprived of their constitutional right to choose a bargaining agent satisfactory to and desired by them, or to bargain individually without the intervention of any bargaining agent.

Not only is the Board's decision excluding appellants DePratter, Mobley, Traina and Diaz from the bargaining unit contrary to their own precedent and illegal, there is not even a scintilla of evidence¹⁶ to support the Board's

¹⁵ The Court might conclude that this was the reason for the exclusion of DePratter, Mobley, Traina and Diaz in this case by the Union and the Employer.

¹⁶ In fact, the evidence is quite to the contrary. The affidavits of Attorney Alley cited by the Board in support of its finding show "clearly" that the parties were only agreeing to a unit, not to the exclusion of certain employees. That after the unit was agreed to, then the parties, whether by mistake or design, removed the appellants DePratter, Mobley, Traina and Diaz from the eligibility list, not because they intended to exclude them, but because they mistakenly believed them to be excluded in that their duties were limited solely to clerical or truck driving and did not include a substantial amount of production work.

finding that the Union and the Employer "understood and intended" to exclude DePratter, Mobley, Traina and Diaz. The Regional Director's Report (Appendix, p. 38A) does not conclude or recommend such finding. In fact, the Board relies on the Employer's attorney's affidavit (Appendix X, pp. 27-28) in making this finding. (Appendix A, pp. 28-31). This affidavit on which the decision of the Board to exclude DePratter, Mobley, Traina and Diaz was based does not "clearly" support the Board's finding, and, in fact, "clearly" shows that it was *not* the intention of the Employer to exclude DePratter, Mobley, Traina and Diaz from the unit. In addition, there is not the first scintilla of evidence on which to base a finding as to the intention of the Union in this regard.

The appellees in their Brief (p. 22) state that—

"the Board found that the parties specifically *contemplated* excluding appellants DePratter, Mobley, Traina and Diaz. This conclusion, together with the Company's awareness that these employees may have performed some¹⁷ production work in addition to their clerical duties, is amply supported by the evidence detailed in the Board decision." (Our emphasis and footnote).

Although appellants have previously shown that all the evidence is contrary to the Board's finding, this statement by appellees warrants additional discussion. First, the Board did not find that the Employer's attorney was aware of the production duties of DePratter, Mobley, Traina and Diaz, but rather, concluded that it was immaterial to the decision whether or not the attorney was ignorant of the fact that these employees performed production work. (Appendix A, pp. 30, 31). Secondly, the

¹⁷ Note again the use of the word "some", when the undisputed fact is that these employees worked regularly a "substantial" amount of time within the unit.

appellees seek by the statement to imply that the substantial evidence rule applies here. There was no hearing in this case on the issues raised, so there could be no testimony to weigh or on which to make credibility findings. The Board decision was made only on the basis of the Regional Director's Report and the affidavits submitted by the Employer and DePratter, Mobley, Traina and Diaz in their Exceptions to the Regional Director's Report. Credibility findings are not made on affidavits, nor are the contents of affidavits weighed. The substantial evidence rule is therefore not applicable to the Board decision in this case.

Although the Board in its decision gave lip service¹⁸ to the intervention of appellants DePratter, Mobley, Traina and Diaz, the conclusion is inescapable that it based its decision on the doctrine of estoppel. In effect, the Board found that the Employer was estopped to raise the Exceptions concerning DePratter, Mobley, Traina and Diaz because it had agreed, "understood and intended" to exclude these four employees in the election agreement.

The Board's decision stated:

"This affidavit clearly reveals that in signing the election agreement excluding 'truck drivers' and 'all office employees and all clerical employees,' the Employer's attorney and the Petitioner's representative understood and intended that the four employees in question were thereby excluded from the unit and 'would be unable to vote because that was their job classification'." (Appendix A, pp. 29-30).

This quotation "clearly" shows that the Board was relying on the doctrine of estoppel. Otherwise, there was no need to use the words "understood and intended" in

¹⁸ This conclusion is warranted by the fact that the intervention was only noted in a footnote and then was found not to raise a different issue from the Employer's Exceptions. (Appendix A, p. 25, footnote 1).

that context. These words were not used to find that the parties intended a different unit from the one agreed to by the Union and the Employer as the Regional Director had concluded. (Appendix 61A) (This Brief, pp. 8-10). Nor were these words used to find that the Employer and the Union had agreed to a system of classification or category for exclusion of employees from the unit differing from the Board's system. (This Brief, pp. 11-15). The only possible use of these words was that since the Employer and the Union had "understood and intended" to exclude DePratter, Mobley, Traina and Diaz from the unit, the Employer was estopped to go against its understanding and intention.

In support of its conclusion that the Employer's Exceptions failed to raise substantial or material issues with respect to the results or conduct of the election, the Board cited the *Stanley Aviation Corporation* case, *supra*, saying:

"The Board ruled that it would be contrary to good administrative practice to reopen the record at the postelection stage of the proceeding to permit such a redetermination, citing its 'well established policy of honoring concessions made in the interest of expeditious handling of representation cases in general'." ¹⁹

¹⁹ Note the similarity of this language with that of appellees in their Brief (p. 23): "* * * the Board, following its consistent policy in *consent election* cases, properly honored the original concession of the parties and held that appellants DePratter, Mobley, Traina and Diaz were excluded from the unit covered by the certification issued to the union." (Our emphasis). It should also be noted that of the cases adopting this "consistent" policy, only one, the *Baird-Ward* case, *supra*, involved a *consent election* as in the present decision. For the only two other decisions of the Board (both of which were consent elections) other than the three cited by appellees (p. 22) on this "consistent" policy, see *Dankner Motor Sales*, 107 NLRB No. 272, and *Volney Felt Mills, Inc.*, 101 NLRB No. 240, which just happen to be inconsistent with the consistent policy. Incidentally, the language

The language shows that the Board considered the Employer was estopped to object because of the Employer's "concession" in agreeing to the unit and "intending" to exclude DePratter, Mobley, Traina and Diaz.

Further substantiation of the fact that the Board's decision is on the basis of estoppel is reference by the Board to what the Employer had the opportunity to do,²⁰ failed to do,²¹ did,²² and understood.²³ This was important only as forming a basis for estoppel against the Employer.

Although there might be sufficient evidence to create an estoppel against the Employer in this case, these appellants could not be estopped by the Employer's action. Accordingly, the Board's decision on the basis of estoppel is clearly erroneous as to the appellants.

The appellants submit that the preceding discussion has clearly shown that the appellants suffered a substantial loss by the illegal exclusion of DePratter, Mobley, Traina and Diaz from the unit. The fact that the substantial loss is the loss of a constitutional right is not questioned by the appellees. The appellants feel that the loss of this constitutional right cannot be demonstrated more clearly than as it is set forth in appellants' main Brief on pp. 28-32.

in the *Dankner* case is interesting—"Obviously, therefore, the eligibility of employees to vote in an election cannot be controlled by agreement of the parties, for otherwise they would usurp the Board's powers on a crucial matter specifically entrusted to it by the statute."

²⁰ "* * * the Employer's attorney had ample opportunity to inquire as to the duties of these employees." (Appendix A, p. 30).

²¹ "* * * DePratter, Mobley and Traina were referred to as 'plant clericals' without objection from the Employer's attorney, * * *." (Appendix A, p. 30).

²² "* * * called the Employer's vice-president and discussed with him the exclusion of these employees." (Appendix A, p. 31).

²³ "* * * understood and intended that the four employees in question were thereby excluded from the unit * * *." (Appendix A, p. 29).

CONCLUSION

The fact that the appellant employees regularly work a substantial amount of time within the unit is not disputed. The law that employees regularly working a substantial amount of time within a unit are included in the unit and are eligible to vote is likewise not disputed. These facts and the law have heretofore been clearly pointed out. Therefore, the exclusion of the appellees from the unit is unlawful and results in a substantial loss of their constitutional rights which is not transparently frivolous. Accordingly, the District Court was in error in dismissing the appellants' complaint on the grounds of lack of jurisdiction.

Although appellants contend that this action in the District Court was not premature, the Board has now acted and the question of prematurity has become moot.

If it is held that employees have no right to go into a court of equity for the protection of their constitutional rights when these rights have been infringed, then a study of the Act and of the decisions of the N.L.R.B. and of the courts will make it clearly evident that an employee is without a protective forum.

They are the one group which is never permitted a day in court.

Respectfully submitted,

CODY FOWLER
Citizens Building
Tampa, Florida

DAVID C. BASTIAN
Colorado Building
Washington, D. C.
Attorneys for Appellants

Of Counsel:

FOWLER, WHITE, GILLEN, YANCEY and HUMKEY
1002 Citizens Building
Tampa 2, Florida

DRURY, LYNHAM & POWELL
312 Colorado Building
Washington, D. C.

AN AFFIDAVIT

I have read the Regional Director's Report on Election, Objections to Election, and Recommendations to the Board. In this Report the Regional Director makes reference to certain events which allegedly occurred at the conference on March 21 in which the election agreement was entered into. In general, the recitation of the Regional Director in said Report is correct as to what transpired at the meeting except that the Regional Director apparently worded the discussion of events to attempt to show that the parties were agreeing to the elimination of particular employees rather than the agreeing upon a particular unit. This was not the case. I was led to believe, however, that the exclusion from the unit of the clerical job classification would exclude DePratter, Traina and Mobley and that the exclusion of the truck driver job classification from the unit would exclude Diaz. We were not agreeing to the exclusion of those employees regardless of their duties but were rather agreeing that they were excluded on the basis that they were clerical workers or truck drivers. There was no discussion at this conference in regard to any work these employees performed other than the work as clerical workers or as

truck drivers. There was no discussion of their production duties or the extent of those duties.

When Field Examiner Strickland pointed out that there would have to be an agreement of the parties on all questions or the Board would have to make a decision, I told him that this might be so but that the agreement would be useless if anything improper was agreed to. The Field Examiner then explained that he was at the conference for that purpose and that he would have to be completely satisfied with the agreement or he would not recommend that it be approved by the Regional Director. He also advised us that unless the Regional Director approved the agreement there would be no election unless it was ordered by the Board. I understood that this was the usual procedure.

It is true that the petitioner contended that DePratter and Traina were ineligible to vote because they were supervisors. I denied this. After considerable discussion on this point with the petitioner's representative, I asked Field Examiner West whether he could recommend that the Regional Director approve an election agreement if we agreed to strike Traina and DePratter from the eligibility list as supervisors. The Field Examiner then replied that in substance there was no evidence before him that Traina and DePratter were supervisors and that all the evidence as to their supervisory status under discussion was that they were not supervisors. On that basis he could not recommend an agreement which involved striking Traina and DePratter. I do not mean to imply by this that I would have agreed to striking Traina and DePratter on the basis that they were supervisors, but only use this as an illustration to dispute West's testimony that he did not tell me he was satisfied that the four employees in question were not eligible to vote.

The petitioner then proposed that the unit exclude cler-

icals and truck drivers and after considerable discussion on this point I telephoned Mr. Hice and told him what the petitioner desired. I believe I stated to him over the 'phone that if we agreed to the unit as requested by the petitioner, excluding clericals and truck drivers, that the four employees in question would be unable to vote because that was their job classification. I was unaware at the time that these employees also performed production work. After finishing my talk with Mr. Hice I then consented that the unit be composed as the petitioner had requested.

After we signed the election agreement Field Examiner insisted that the employees within the job classifications excluded be stricken from the eligibility list. It was at this time that I inquired as to whether or not he was satisfied that these employees could be stricken from the eligibility list under the unit agreed upon. I made such an inquiry because of the incident concerning the alleged supervisory status and because he had told me that he had to be satisfied with the agreement or he would not recommend its approval to the Regional Director. West assured me that he was satisfied that these employees were excluded from the unit and ineligible to vote within the unit agreed to, otherwise he would not recommend the agreement to the Regional Director, and on this basis and this basis alone I initialed the eligibility list with the names of the employees in question stricken therefrom. (Due to a clerical error, Traina's name had been left off the list so it was not stricken).

Field Examiner West states that there was a discussion concerning the production work performed by the employees in question. I deny that there was any such discussion or any remarks were made which indicated that any of the four employees in question performed production or maintenance work.

There was no agreement arrived at this conference as

to certain standards, definitions, systems of classifications or understandings for determination of employees' eligibility to be within the unit or to vote in the election held on April 4 and 5, 1955. There was no agreement intended nor was an agreement entered into to exclude part-time employees.

During the investigation of the Objections to the Election filed by the employer, I inquired of Field Examiner Strickland in regard to the fact that he was not inquiring into the eligibility of the employees in question. He informed me that this was unnecessary for the investigation being conducted and that he was not going to inquire into the matter.

The Regional Director in his Report states that I refused to give Field Examiner Strickland a statement. This is not true. I did not refuse to give a statement. I have given statements previously to Board Agents investigating matters on which I had knowledge of the necessary facts. Field Examiner Strickland did mention in the investigation that he thought it might be necessary for me to give a statement since there seemed to be considerable conflict on who said what and what was said at certain strategic times. I told him that I hoped that this case could be decided without a swearing match as to who said what and when and that I felt that the case could be so decided. I, however, did not refuse to give a statement and if he had requested that I give a statement I would have done so.

During the pre-election conference held on April 4, 1955, Field Examiner Resin did state and name the four employees in question and told the employer's representative that if they came to the polls he would not permit them to vote and would send them back to the factory. Since he was permitting DePratter to serve as an observer he evidently had reference to the fact that he

would only send three employees in question back to the factory but that he would not permit any of the four to vote. We were not questioning Field Examiner Resin as to the rights of these employees because we were under the belief that these employees were, in fact, not eligible. We were just attempting to determine from Field Examiner Resin whether or not we should permit these employees to come to the polls with the other employees. He did not tell us whether we should inform the employees of their eligibility but he did advise us of the consequences if they did show up at the polls. He mentioned that they would not be permitted to vote if they came, and later on in the election he mentioned the fact that if any ineligible employees such as clerical workers appeared at the polls he would invalidate the election. He also mentioned the employer's supervisors and representatives of the petitioner. Field Examiner Resin had already told us that, as DePratter was not a supervisor, she could serve as an observer as we had specifically asked him about her serving as an observer.

Although Field Examiner Strickland did not inquire of any of the witnesses as to a conference held in the Hillsborough County Port Authority Building on Friday, April 1, between myself, Resin, Jack Fitzgerald and Hice, the Regional Director makes reference to that conference. I have read the affidavit of Hice which is attached to the Exceptions to be filed in this matter and hereby swear the recitation therein as to the occurrences on Friday, April 4, concerning the meeting with Field Examiner Resin is true to the best of my knowledge and I hereby adopt that portion of Hice's statement as my own.

In footnote 20 on page 14 of the Regional Director's Report, he states that the employer insisted by and through myself to be present when the employees were interviewed by Field Examiner Strickland. This is not true. I deny that I at any time insisted that I must be

present when Field Examiner Strickland was interviewing any of the witnesses. I did explain to Strickland that I had not interviewed any of the witnesses to be presented by the Company, other than Mobley, DePratter, Traina and Diaz, and that I did not know what facts would be brought out during the interview of the witnesses. I requested that I be present so that he might proceed more rapidly. Strickland did not raise any objections to my presence while the witnesses were testifying. At one point Field Examiner Strickland asked me to leave the room while talking to one of the witnesses. I immediately left the room without protest. If Field Examiner Strickland had stated to me that he did not want my presence during the interview of the witnesses, I would not have remained.

In this same footnote, the Regional Director states that I instructed Drum and DePratter not to sign affidavits prepared by Field Examiner Strickland and undertook to prepare the affidavits and submit them subsequently. The truth of the matter is that when DePratter had finished testifying and was reading her statement she found certain errors in it and she also thought certain matters should be enlarged and other matters included. She consulted with me on the statement and I suggested to Strickland that a company stenographer could retype the statement with the alterations desired by DePratter and we could proceed with the investigation. This was agreeable to Strickland and was the procedure followed in this instance. It is true that when Drum finished testifying before Field Examiner Strickland I advised her not to sign the statement at this time but to consider the contents thereof further. I did not consult with Drum in the preparation of her statement in any manner, shape or form. I did not offer my suggestions or changes of any sort or manner whatsoever. I did not talk with Drum prior to or following her interview with Strickland

/s/ Granville M. Alley, Jr.
Granville M. Alley, Jr.

/s/ Mary L. Newman

My Commission expires: Oct. 25, 1957.

(SEAL)

AN AFFIDAVIT

STATE OF FLORIDA)
) SS:
(COUNTY OF HILLSBOROUGH)

Before me, the undersigned authority, personally appeared GRANVILLE M. ALLEY, JR., who, being by me first duly sworn deposes and says:

I wish to state that at no time during the investigation by Field Examiner Strickland did I refuse to give a statement to him. In the course of his investigation, Field Examiner Strickland stated to me that it looked like he might have to take my statement concerning what exactly was said at certain times. I stated to him that I hoped and felt that this case could be decided without a swearing match. However, I at no time refused to give a statement.

I have read the Regional Director's Report on Election and Objections to Election and Recommendations to the Board. On page 14 in footnote 20, the Regional Director implies that the Employer through myself insisted on being present when the witnesses were interviewed. This was not the case. We asked permission from Strickland to be present during the investigation and interview of the witnesses we presented. We explained to Field Examiner Strickland that I had not interviewed any of the witnesses previously (other than DePratter, Traina, Mobley and Diaz). I could have interviewed each witness prior to Strickland and then told Strickland what he might learn from the witness, or I could have interviewed them afterward and have them change their statement if I uncovered certain facts which Strickland had failed to uncover or if I felt that the witnesses' statements should be enlarged upon on any particular point. Personally I would think the Board would prefer that it talk to the witnesses before interview by partisan attorney. The fact that I had not gone over the facts with the witnesses prior to interview by Strickland is certainly shown by the fact that Ruth Drum did not at first recall that Resin had referred to the clerical employees as being ineligible to vote. I did ask that Drum consider her statement further before signing it, but I did not prepare her statement for her as is stated in the Regional Director's Report. I did not consult with her or advise her in any way concerning her statement. I took no part in the preparation of her statement. She later told me that she prepared her statement herself. I did not prepare DePratter's statement either. Mr. Strickland had typed out her statement and it contained certain errors and changes she wanted to make. In addition she wanted to rearrange part of her statement and to enlarge it in other respects. The changes were made and I told Strickland that I would have one of the Company's secretaries retype it so

we could proceed. He raised no objection to this procedure.

Field Examiner Strickland did not object to my presence at any time. If he had, I would not have remained. In one case when he was interviewing a witness, he asked to talk to him alone. I immediately left the room and raised no protest whatsoever.

Upon my inquiry, Field Examiner Strickland said there would be no investigation of the eligibility of the employees in question, since that was not necessary to the investigation. I remarked at that time that this would appear to show that the case was already decided.

In general the recitation of the meeting in which the Consent Election Agreement was signed in the Regional Director's Report is accurate. However, I must take exception to the allegation that there was discussion of the duties of the parties other than their clerical duties. There was nothing said concerning the duties of the employees in question in the production work. If there had been such a discussion, or if I had known that these employees worked a substantial amount of time in production, I would not have permitted them to be stricken from the eligibility list. I do not believe Field Examiner West would have either.

The recitation of the differences between the parties is deliberately distorted by the Regional Director to lead one to believe that we were trying to eliminate the particular employees rather than agree to the unit. This was not the case. Although I believed that by agreeing to the unit proposed by the Petitioner it would result in the elimination of the parties in question, the entire discussion was directed toward agreeing to a unit. I vigorously protested the Petitioner's change in the unit designation to exclude plant clericals. The same is true as to the exclusion from the unit of the truck driver.

I cannot understand West denying that he told the parties that he must be satisfied with the entire agreement or he would not recommend it to the Regional Director. He stated that he would have to be satisfied with the entire agreement or he would not recommend it to the Regional Director. I specifically asked West if he was satisfied that the parties who were to be stricken were excluded from the unit agreed upon. To this he replied that he was and that otherwise he would not recommend that the Regional Director approve it. On this basis I agreed to the exclusions.

I have read the statement of Billy D. Hice, signed this day and hereby swear that the recitations therein as to the occurrences on Friday, April 11th concerning the meeting with Field Examiner Resin is true to the best of my recollection.

As to the pre-election conference, I recall that Field Examiner Resin did say that he would not permit the parties in question to vote.

At the conference on March 21, 1955 when the Election Agreement was entered into, there was no discussion of part-time employees. There was no intention on my part to exclude part-time employees. We did not enter into any agreement to exclude part-time employees or dual employees. We did not agree to certain standards, definitions, systems of classification, or understanding for determining eligibility.¹

/s/ Granville M. Alley, Jr.
GRANVILLE M. ALLEY, JR.

¹ Typographical errors and exclusions in the original affidavit filed on the 24th day of May, 1955, and submitted with the Employees' Exceptions to the Regional Director's Report was corrected on the 25th day of May, 1955. This affidavit included here is the corrected version of the affidavit.

Sworn to and subscribed before
me this 25th day of May, 1955.

/s/ Mary L. Newman
Notary Public, State of Florida at Large

My Commission expires: Oct. 25, 1957.

(SEAL)

